TEXAS DEPARTMENT OF MOTOR VEHICLES

BOARD MEETING

9:00 a.m. Thursday, December 8, 2011

Room 1.B1
Building 150
200 East Riverside Drive
Austin, Texas 78704

BOARD MEMBERS:

Victor Vandergriff, Chair Cheryl E. Johnson, Vice Chair Cliff Butler Blake Ingram Raymond Palacios Victor Rodriguez (Absent) Marvin Rush (Absent) Laura Ryan Johnny Walker

STAFF MEMBERS:

Linda M. Flores, Interim Executive Director Brett Bray, General Counsel

I N D E X

AGEI	IDA LTI	<u> - 단</u>	PAGE
1.	CALL A.	TO ORDER Roll Call and Establishment of Quorum	4
	В.	Public Comment (no commenters)	5
	С.	Special Recognition of Outgoing Board Member Cliff Butler	186
2.	CONSI	ENT AGENDA	6
	Α.	Consideration of Enforcement Agreed Orders under Occupations Code, Chapter 2301	
	В.	Consideration of Enforcement Notice of Violation Citation Agreed Orders under Occupations Code, Chapter 2301	
	С.	Consideration of Enforcement Dismissal Orders under Occupations Code, Chapter 3201	
	D.	Consideration of Settlement and Dismissal Orders under Occupations Code, §2301.204 (Warranty Performance Complaints)	
	Ε.	Consideration of Franchise Case Dismissal Orders under Occupations Code, Chapter 2301	_
3.		LUTIONS FOR INDIVIDUAL CONSIDERATION - S AND CONTESTED CASES	
	A.	Docket No. 09-0034 LIC - Star Houston, Inc. d/b/a Star Motor Cars v. Mercedes-Benz USA, LLC; Star Motor Cars Interim Appeal of SOAH ALJ's rulings on Motions to Abate and to Consolidate Docket No. 11-0003 LIC - Star Houston, Inc. d/b/a Star Motor Cars, Protestant, v. Mercedes-Benz USA, LLC, Respondent	
	В.	Adoption of Rules under Title 43, Texas Administrative Code Chapter 208 - Employment Practices Subchapter C. Employee Training and Education §208.4, Definitions §208.43, General Standards §208.44, Particular Programs	7
	C.	Consideration of Enforcement Motions for Disposition Based on Default under Occupations Code Chapter 2301	9

(see attached itemized list B)

4.	BRIEI A.	FINGS AND ACTION ITEMS Consideration of Formal Opinion Request from TADA concerning factory website marketing program incentive payments	127
	В.	Election of Vice Chair	123
	C.	Approval for Specialty Plate Designs 1. Calvary Hill 2. Keller High School 3. University of Louisiana 4. Michigan State University 5. University of South Carolina	30
	D.	<pre>Advisory Committee Updates Oversize/Overweight Advisory Committee Report</pre>	10
		 Appointment of Motor Vehicle Special Advisory Committee on Licensing Process 	18
	E.	Legislative Implementation Progress Report	21
	F.	Consideration and Possible Approval of the Internal Audit Charter	28
5.	BRIEI A.	FINGS, DISCUSSION and POSSIBLE ACTION Chair Reports	173
	в.	Interim Executive Director Reports	175
6.	EXEC	UTIVE SESSION (none required)	
7.		ON ITEMS FROM EXECUTIVE SESSION e required)	
8.	ADJO	JRNMENT	188

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PROCEEDINGS

MR. VANDERGRIFF: Good morning. My name is
Victor Vandergriff, and I'm pleased to welcome you here
today to the meeting of the Board of the Department of
Motor Vehicles. I'm now calling the meeting for December
8, 2011, of the Board of the Texas Department of Motor
Vehicles to order, and I want to note for the record that
public notice of this meeting, containing all items on the
agenda, was filed with the Office of Secretary of State on
November 29, 2011.

Before we begin today's meeting, please place all cell phones and other communication devices on the silent mode. And if you wish to address the board during today's meeting, please complete a speaker's card at the registration table in the back of the room. To comment on an agenda item, please complete a yellow card and identify the agenda item. If it is not an agenda item, we will take your comments up during the public portion of the meeting.

And now I'd like to have a roll call, please of the board members. Board Member Butler?

MR. BUTLER: Present.

MR. VANDERGRIFF: Board Member Ingram?

MR. INGRAM: Here.

MR. VANDERGRIFF: Vice Chair Johnson?

(512) 450-0342

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1	MS. JOHNSON: Present.
2	MR. VANDERGRIFF: Board Member Palacios?
3	MR. PALACIOS: Present.
4	MR. VANDERGRIFF: Board Member Ryan.
5	MS. RYAN: Present.
6	MR. VANDERGRIFF: Board Member Walker?
7	MR. WALKER: Present.
8	MR. VANDERGRIFF: And let the record reflect
9	that I, Victor Vandergriff, am also present too, we do
10	have a quorum. Board Members Rodriguez and Rush are
11	absent from today's meeting.
12	Our next item of business is to note if we have
13	anybody in the audience who wishes to make a public
14	comment in general. I do not have any cards or any
15	indication from the audience, so we'll move to our next
16	item. And I'm going to actually, because we're waiting on
17	a special bit of memorabilia, I'd just ask that we defer
18	on the special recognition of Mr. Butler. Cliff Butler
19	will be leaving us at the end of this meeting; this will
20	be his last meeting with us, and so we're going to defer
21	comment on that for a special recognition a little bit
22	later.
23	The next item on the agenda is the consent
24	agenda, item number 2, and I'd ask Mr. Harbeson to come

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up, please.

MR. HARBESON: Good morning. My name is Bill 1 Harbeson. I'm the director of the Enforcement Division 2 3 for the Department of Motor Vehicles. On today's consent agenda we are presenting to 4 the board 50 enforcement agreed orders, 26 enforcement 5 6 notice of violation cases, six enforcement motions to dismiss cases, and four cases from the Lemon Law section 7 8 where you've been presented with orders for dismissal. There are also seven cases from franchise cases where 9 10 there are orders of dismissal. We are asking the board to 11 approve these orders. MR. WALKER: So moved. 12 13 MS. JOHNSON: Second. MR. VANDERGRIFF: We have a motion from Board 14 15 Member Walker and a second from Vice Chair Johnson. Any discussion? 16 17 (No response.) MR. VANDERGRIFF: Seeing none, please raise 18 19 your right hand in support. (A show of hands.) 20 MR. VANDERGRIFF: Thank you, Mr. Harbeson. 21 We're going to kind of jump out of order just a 22 little bit here. For the members of the audience, I will 2.3

let you know that we have some members in our staff that

have other things they need to do, so we're going to take

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up a couple more matters administratively and then take up the specialty license plates first before we go into the Star Motor case and moving forward. So I guess I'll go to 3.B on the agenda. Dawn, are you ready?

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MS. HEIKKILA: Good morning, Mr. Chairman, members. My name is Dawn Heikkila. I'm the chief operating officer for the Department of Motor Vehicles.

I have before you today the adoption of the TAC rules. The department proposes adoption of repeals to Sections 208.42 and 208.44 and amendments to Section 208.43 of our Education Assistance Program.

The current program was adapted from the TxDOT program. At the July board meeting the board approved the publication the new TAC rules. The change includes requiring a signed commitment for employment for six months to begin the month following reimbursement, or the department may require the employee to reimburse the department for tuition, and requiring the executive director to adopt policies and procedures related to education and training for employees.

In order to participate in the program, an employee has to be fully employed full time for one year, a one year period before applying to the program, and must not be under any disciplinary actions during the six months prior to application or be on probation.

1	The program will be a reimbursement type
2	program. The department will limit the mandatory
3	reimbursement to fees and tuition in an amount equal to
4	the latest semester hour cost for Texas public education
5	colleges reported by the Texas Higher Education
6	Coordinating Board. In addition to an employment
7	commitment, the program participants must provide the
8	department with grade reports or a transcript and an
9	itemized statement of tuition and fees in order to be
10	reimbursed.
11	The original proposal was published in the
12	September 23 issue of the Texas Register, no public
13	comments were received. I recommend the repeal of
14	Sections 208.42 and 208.44 and the amendment to Section
15	208.43 be adopted.
16	MR. WALKER: I so move.
17	MR. BUTLER: Second.
18	MR. VANDERGRIFF: We have a motion Director
19	Walker, second from Director Butler. Any discussion?
20	(No response.)
21	MR. VANDERGRIFF: Seeing none, please raise
22	your right hand in support.
23	(A show of hands.)
24	MR. VANDERGRIFF: Thank you very much.
25	Mr. Harbeson, would you come up on item number

ON THE RECORD REPORTING (512) 450-0342

3.C, please? 1 2 MR. HARBESON: My name is Bill Harbeson. the director of the Enforcement Division. 3 Before the board today are two motions for 4 disposition that the staff has filed following a default 5 6 by the respondent at the State Office of Administrative 7 Hearings. You have before you the motion, together with the accompanying documents, plus an order that the staff 8 today is asking you to approve. 9 10 MR. VANDERGRIFF: Do we have any questions from the board? 11 12 (No response.) 13 MR. VANDERGRIFF: Seeing none, I'd be pleased to entertain a motion. 14 15 MR. INGRAM: I move that we accept the 16 consideration of enforcement motions based for disposition based on default. 17 MS. JOHNSON: I'll second that motion. 18 19 MR. VANDERGRIFF: We have a motion from Director Ingram, a second from Vice Chair Johnson. Do we 20 have any discussion? 21 22 (No response.) MR. VANDERGRIFF: Seeing none, please raise 2.3 24 your right hand in support.

ON THE RECORD REPORTING (512) 450-0342

(A show of hands.)

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MR. VANDERGRIFF: The motion passes. 1 2 (General talking and laughter.) 3 MR. VANDERGRIFF: Thank you very much. We're going to skip around just a little bit 4 I think I sent two people to see where Gail might 5 6 be with that particular letter, I'll send a third one. 7 Thank you very much, Gloria. 8 I'd like to go to item 4.D and the advisory committee updates. Mr. Walker, and I think Aline is here 9 10 as well. Now I'm throwing him off. MR. WALKER: I'm looking at 4. 11 MR. VANDERGRIFF: Oversize/Overweight Advisory 12 13 Committee. MR. WALKER: I'm up to date on that. 14 15 MR. BRAY: Mr. Chairman, while we're stalling, 16 just to clarify that item 2, item 3.B and item 3.C all 17 passed unanimously. MR. VANDERGRIFF: Item 2, item 3.B and item 3.C 18 19 all passed unanimously. 20 All right, Mr. Walker. MR. WALKER: Okay. Yesterday I met with staff, 21 22 in particular I met with Aline and Linda and the rest of the people that are working on the MOU. The MOU is in a 2.3 24 final stage, which we have been in a final stage for the 25 last three months on this thing with TxDOT. It is over

there waiting for them to either change any last minute details or to take and sign off on it. We have a redline copy, and I think the only two items that are left on this -- and Aline is here still -- is that we have only the issue with the grant, the CVISN. Correct me if I'm wrong.

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MS. AUCOIN: For the record, I'm Aline Aucoin, associate general counsel.

At this point we're not certain what TxDOT will or won't do, but the issues that we know exist at this time are we need to make some final updates to the attachments on some contracts that have expired dates and we may need TxDOT to update that information, we don't have that information in our possession. There may or may not be an issue on the CVISN grant. CVISN stands for Commercial Vehicle Information Systems and Networks.

We're not certain whether TxDOT will keep that grant or transfer it over.

We're very, very close to having a final agreement, we're just not there yet.

MR. WALKER: We really don't know what this CVISN grant is specifically other than the fact that it's \$2 million and it's been out there for 20 years. Is that not correct?

MR. BRAY: It's a continuing process for 20

years, yes.

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MS. FLORES: And the balance of the grant is \$2 million.

MR. WALKER: And it's got a balance of \$2 million, and it's a matching grant we have to be concerned with because any of the money that we do get from the federal government, we have to match that out of our budget.

MS. AUCOIN: And the last word from TxDOT was that TxDOT was willing to transfer matching funds for the current grants that are in place. We are looking at the issue of if we take on this grant and apply for grant money in the future that the grants may have a state matching requirement.

MR. WALKER: So it's something we would need to keep track of so that we know how much we would have to budget for on these grants in our budget.

MS. JOHNSON: Mr. Walker, if I could ask a question, or staff. What is happening now operationally within the department since this is taking so long to resolve? Are we already making the move? Ms. Flores, maybe you should answer. Are we proceeding operationally?

MR. WALKER: Yes. I can answer that, I think.

Ms. Flores, correct me if I do it wrong.

The law says that on January 1 the

ON THE RECORD REPORTING (512) 450-0342

Oversize/Overweight Division of TxDOT will be a part of DMV, regardless of whether this MOU is in place or not. The MOU is not a requirement of the law for the transition to take place. Is that not correct, Aline?

MS. AUCOIN: That's correct.

MR. WALKER: So we're going to go forward. The MOU is an option that this board decided to put in place to kind of clean up the details as to how the transition would take place, regardless of what happens within the next three weeks.

As for staff, we are going through and we're going to move, I think, there's about eight people that are moving, we're going to consolidate Enforcement people. Those eight people are moving from their building over there at Camp Hubbard over to Bill's offices. We've already made the accommodations for those people, desks are in place, everything is ready. We are going to start moving those people in the next two weeks.

We've instructed staff also to start having meetings with the people prior to the transition to go over our benefits with them, go over how the program works. There's people over there that we feel are a little bit concerned about how the program is going to work, about what the status of their employment might be.

One of the comments that I picked upon

yesterday that Carol Davis made was that the TxPROS system has worked so well over there recently that there's been some concern because of the volume of the actual work that the people have been doing because it's all been in the past been done manually, and today because of the new efficiencies that the system has picked up, there may not be as much workload going on over there, so there's some concern that because of the new TxPROS system, are we going to lose our jobs. So we're going to sit down and have some meetings with those people and go over that.

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Another concern that we had that we talked about yesterday was we just passed this new rule on this educational deal, it's quite to the contrast of what they have. They have about eight people over there that are under some educational programs over there. TxDOT does it differently, TxDOT prepays and says, You want to go to St. Edwards, it's going to be \$20,000 a semester, here's the \$20,000 to pay for it. We don't do that. And they get a two-year commitment. So there's a cut, there's kind of a little bit of some questions as to how those transition cuts are going to take place between our agency and between theirs as to what happens to the commitment, what happens to the bills that are paid because they're going forward.

So as of the effective date on January 1, if

they continue continuing education, they would have had it paid for by TxDOT over there, but going forward they'll have to prepay that and then after they complete, and we only pay to the average of the state institutions' fee, whatever it is, average of Texas A&M, Texas and Texas State, I guess, we pay the average and they pay whatever the bill might be. So if they went to, I quess, Harvard and it's 20,000 bucks and TxDOT approves it, they pay the bill before you go there. So there's some concerns that some of the employees have that we've got to work through, and they want to know how we're going to handle that, so we have instructed staff to meet with the employees within the next two weeks to go over the details, to kind of have a party, so to speak, or a little social function to sit down and talk to them. It might be a good idea that Mr. Vandergriff be there, Ms. Flores or myself to sit down and talk to these people prior to that transition.

MS. JOHNSON: Thank you.

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MS. AUCOIN: And one additional thing that we're waiting on at this point we still need to get approval from the Legislative Budget Board on the number of FTEs as well as the budget, and Linda has been in contact with the LBB answering questions, and we just haven't gotten the approval yet.

MR. WALKER: There is one other issue that I'd

like to clarify today in this meeting in a public forum. In our July meeting that we had we authorized the staff to go out and create an MOU to oversee the transition, and we also authorized the executive director of the agency to be the signor of that MOU when the transition takes place in lieu of the board signing off on that, and I'd like to get a reconfirmation today that the board is still good with the fact that Linda will be able to sign this MOU that comes out in the next two weeks. Obviously, we're not going to be here to sign off on it, so I'd like to get board approval again on that, if I could.

MR. VANDERGRIFF: Okay.

MR. WALKER: So I'd like to make a motion that the board okay the authorization of the MOU and the signing of the MOU by Linda Flores.

MR. INGRAM: I'll second that.

MR. VANDERGRIFF: We have a motion and a second to confirm our authorization that we've done previously for the executive director to sign the MOU when it's prepared, and I think that language also included that the MOU will be reviewed by Director Walker.

MR. WALKER: The advisory board, yes. We will review that, and I have been in contact with Aline over here on that, so I will know when it goes down.

MR. BRAY: It also calls for your approval.

1	MR. VANDERGRIFF: Yes, it included the chair as
2	well.
3	MR. WALKER: And let me make a comment. The
4	MOU is for about \$7 million.
5	MS. AUCOIN: A year.
6	MS. FLORES: It's a two-year MOU.
7	MR. WALKER: \$14 million.
8	MR. VANDERGRIFF: So we're confirming the
9	action we took back last summer.
10	MR. WALKER: Yes.
11	MR. VANDERGRIFF: We have a motion and a second
12	from Director Ingram. Do we have any further discussion
13	or questions?
14	(No response.)
15	MR. VANDERGRIFF: Please raise your right hand
16	in support of the motion.
17	(A show of hands.)
18	MR. VANDERGRIFF: Motion carries unanimously of
19	the board members present. Thank you very much.
20	We'll do one more item, 4.D, the second bullet
21	point there.
22	Mr. Bray, do you have a resolution handy on
23	that particular item?
24	MR. BRAY: I do. I have electronically, so
25	bear with me.

ON THE RECORD REPORTING (512) 450-0342

MR. VANDERGRIFF: I do too, but I'm hoping she's got one in hard copy. I apologize to the audience.

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And I'm going to alert one more item that we'll take up that I think we need to make sure, Mr. Lawler, are you here and ready on item 4.F? Okay. I see him in the back. Okay, great.

Board members, we discussed this at the last board meeting and we are appointing a special advisory committee to help review the licensing process, this is the Motor Vehicle licensing process for franchised, independent and manufacturers and distributors.

We'll talk further in this meeting when we do the chair and executive director reports about the business process analysis. Some of you have heard that terminology, most of you have. One of the 19 initiatives coming out of the process we've been working on for the last year is the streamlining of the licensing process here, and I believe that's something that we can accomplish during the course of 2012, so we want to make sure that we get industry support and representation on a special advisory committee.

Board Member Blake Ingram will be chairing that committee; Board Members Laura Ryan and Raymond Palacios will be on the committee, as well as -- and I will let the chair of the committee discuss the other appointments --

there are actually six: Bob Kee, Bruce Orman, Paul Morgan, Brett Rhodes, Mike Regan, and Ken Roche.

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And you may wish to address this specifically, Mr. Ingram.

MR. INGRAM: Sure. And so the concept was that we wanted to get input from all the different stakeholders that would be involved, so I looked at it from the approach of trying to figure out each one of those segments, as many as I could, obviously. The first one is that we have an additional new car representative, we also have an additional used car representative, and I say that because, obviously, Raymond and I are both on the committee. We also have a representative from the RV industry which is severely impacted by our rules because every single one, they sometimes have ten or twenty different franchises so they have to go through the process ten or twenty times. We also included motorcycle which is also impacted.

MR. VANDERGRIFF: Can you identify which ones those are?

MR. INGRAM: Sure, absolutely. Bob Kee is with Destination Cycle and he is our motorcycle representative. Brent Rhodes, he's with Fiesta Motors, he is a used car representative. We also have Mike Regan with Crestview RV as our RV representative. Paul Morgan is with Park Place

1	as new car. We have our three board members. We also
2	have one manufacturer's rep, Ken Roche. And the final one
3	would be salvage, and that's Bruce Orman. And included
4	salvage because many times salvage dealers have both
5	licenses, or at least sometimes they should have both
6	licenses, so they're also looking at trying to do some
7	work in 2302 which is their occupations code, so it would
8	probably make sense to include them in this process as
9	well. And I believe that's the ten members, as well as
10	the three board members.
11	MR. VANDERGRIFF: Great. Do any board members
12	have any questions before I'll ask Mr. Ingram for a motion
13	on this?
14	(No response.)
15	MR. VANDERGRIFF: Mr. Ingram, would you please
16	make a motion to appoint this committee?
17	MR. INGRAM: I will so move.
18	MR. VANDERGRIFF: Do I have a second?
19	MR. BUTLER: Second.
20	MR. VANDERGRIFF: Second from Mr. Butler. All
21	those in favor please raise your right hand in support.
22	(A show of hands.)
23	MR. VANDERGRIFF: The motion carries
24	unanimously. Thank you very much.
25	So we're kind of sort of staying in order of

ON THE RECORD REPORTING (512) 450-0342

this out-of-order agenda, I will ask Mr. Kuntz, is your report ready and relatively brief, pending questions?

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And I'll also ask the board members is this a second letter coming in?

MS. JOHNSON: It's a replacement.

MR. VANDERGRIFF: I think she has another one.

I apologize. We have letters on a couple of the specialty plates that have come in. I think the board members did get the one that was just passed to you recently to substitute for one you had previously.

MR. KUNTZ: Jeremiah Kuntz, the director of Government and Strategic Communications.

I just want to give you a brief overview and report on where are we with legislative implementation. The last time that I reported to you, we were about halfway through implementing our legislation. We had 41 pieces of legislation that impacted us in some form or fashion. Seventeen bills were implemented before the November board meeting — in other words, they were completed, there were no other actions that were needed at that time. And then there were two that we determined that we actually didn't need to take any action on. Since then, another twelve have been completed and we still have ten that are going to require some kind of action going forward.

We're prepared a very short report for you to try and overview what bills we've completed to date. All of the license plate bills have been concluded and are going to be available as of January 1, I think is the last date. We have some that are still waiting to be available but they'll be available in time.

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The bills that are left, we've got HB 422 which deals with Oversize/Overweight permits. That bill had three permits that were permissive. There is not a required action from that bill, but we're still looking at the possibility of looking at those permits at some point in time in the future, but there's not an actual required action from that bill.

890 deals with street rods and custom rods. We're going to have rules coming from Randy on that, and those plates and the ability to register a hotrod will be available in February.

We've got 2017 which was the cleanup bill for the department. We're still working on rules, they were published and so the comment period ends in December and the rules will be considered in February, so we'll be wrapping that up in the next couple of months as well.

2357, our largest bill that had a lot of rewrite of the Vehicle Titles and Registration system, there were a lot of permissive parts to that bill, there

were a few pieces that were required and those have rules that are pending before you and will be considered. The other portions of that that are permissive we'll address as we go forward as we identify the need to make changes in accordance with those provisions.

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HB 2872, the rules are currently being developed by general counsel and the Motor Vehicle Division that had to do with being able to sell vehicles at a show, like an RV show. Those are in process, we're not out of compliance, we're still on track with those.

SB 197, compulsory inspection of a motor vehicle, this was a study. We've reached out to DPS. There's actually two studies that were required by legislation, this dealing with consolidating the vehicle inspection and registration stickers into one sticker, and then the other study was in another bill, in 2357, dealing with information sharing between DPS and the department. We have a meeting set up with DPS to start the process of completing that study, and we've got until the beginning of next session or until next December to complete those studies, so we've got lots of time but we're starting that process.

SB 529, there have been meetings with the industry and the Motor Vehicle Division on the provisions of that bill. They've been working with the industry,

trying to identify how to implement those provisions and that work continues.

MR. VANDERGRIFF: You notice that it said December 8, but I think we're going to do that at the January board meeting.

MR. KUNTZ: Right.

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SB 690 was provisions for self-storage facility liens. The forms have been completed and the title manuals updated and they'll be sending that notice out to the counties in December, so that's very close to being completed. It had to do with the self-storage facility liens, if there was a vehicle that was in a self-storage facility and the person didn't pay and the storage facility is trying to sell that vehicle as an auction item.

MR. WALKER: So they don't have liening rights today?

MR. KUNTZ: They do have liening rights, but there were changes to the notifications for that, how they notify the individual that the vehicle is going to be sold and the title will be transferred. So they've got the lien right but there were some allowances to allow them to communicate with the owner of the vehicle that's in the self-storage facility by email or other means, so there were some changes in how they notify the individual that

their vehicle is going to be sold at an auction.

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MR. WALKER: So what makes a storage facility, I'm thinking of a U-store facility, I guess, or you rent a garage, what makes that different than a wrecker storage yard where he stores a vehicle and files the same kind of lien. Did it affect that?

MR. KUNTZ: No. This had to do with self-storage facilities, not like an impoundment lot or anything.

MR. WALKER: Wouldn't they both be storage?

MR. INGRAM: I think the key word is "self."

MR. KUNTZ: Correct. It's self-storage, and the law separates that, they have a specific provision for self-storage facilities.

SB 420, you already got the update on that earlier dealing with the transfer of the Oversize/Overweight provisions from TxDOT over here.

That's as you presented, it's on track in the final stages of being reviewed.

And then finally, SB 1733 dealing with occupational licenses of spouses of members of the military. The rules are being developed. My understanding is it's the current practice right now but we're developing rules to formalize the practice. It gives a preference to hiring the spouses of military for

occupational reasons.

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MR. WALKER: What is occupational licensing?

MR. BRAY: Occupational licensing it's in the

Occupations Code. The only one I'm certain of is the

representative license that's issued out of the Motor

Vehicle Division. I'm pretty certain that's an

occupational license.

MR. VANDERGRIFF: Mr. Bray, can you make sure that the board knows what the question was?

MR. WALKER: My question is what is an occupational license.

MR. VANDERGRIFF: Okay.

MR. KUNTZ: The bill was broad to cover any occupational license, it was not specific to this agency, it was written for all occupational licensing, and it basically said that there's an alternative licensing procedure for a licensed applicant who is the spouse of a person serving on active duty as a member of the armed services of the United States, and then it said the spouse must either currently hold a license issued by another state or has a licensing requirement that are substantially equivalent to the requirements of the license of Texas, or within five years preceding the occupation date had held the license in Texas that expired while the applicant lived in another state for at least

six months.

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So it's to assist persons that being displaced because of the military and they're licensed in another state and they're coming into this state because their spouse is in the military, and it gives them an alternative process for getting application for their occupational license.

MR. WALKER: I still haven't got the answer to my question.

MR. BRAY: And it's a difficult question to answer on the fly; I'll be happy to research it for you. But if it's an individual moving into Texas that used to be a car dealer somewhere else and they're going to be an individual car dealer in Texas, it might apply, it's just that our dealer's license extends far beyond and defines a dealer in a way that includes other than people, and the occupational license bill was about people and getting their license to conduct an occupation, hairdresser, lawyer, whatever. But when J.D. Walker Trucking, Inc. gets a license, that's not really an occupational license.

MR. WALKER: An occupational license in our particular case might be a license to sell used cars.

MR. BRAY: It might be for an individual. I'm not certain of that, I'm going to study that pretty carefully.

MR. INGRAM: It would obviously be something that's important with the upcoming changes to the rules.

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MR. VANDERGRIFF: Thank you, Mr. Kuntz.

Mr. Lawler, are you ready to come up and talk about the Internal Audit Charter?

MR. LAWLER: Good morning, Chairman Vandergriff and board members. My name is Bill Lawler. I'm the director of Audit for the Department of Motor Vehicles. This is my first chance to meet some of the board members, so you can put a face to a name. The reason I'm here this morning is to put before you for your approval an Internal Audit Charter.

To give you a little background on this, the Internal Audit shop is governed by the Texas Internal Auditing Act which is Chapter 2102 of the Government Code. The requirements of this law include that the Audit shop follow basically what we call the Red Book, the International Standards for the Professional Practice of Internal Auditing, as well as the Yellow Book, the Government Auditing Standards. One of the requirements of the Red Book is that the Internal Audit shop have in place a board approved audit charter which basically serves as the contract with the board, and it requires that we lay out the purpose, authority and responsibilities of the Internal Audit function.

And that's what I've included in this document 1 2 which basically the language for our responsibilities 3 tracks the Internal Auditing Act pretty close, and so I've tried to keep it as simple as possible and keep it as 4 functional and flexible as possible. 5 6 MR. VANDERGRIFF: Please. MS. JOHNSON: Mr. Lawler, I have one question. 7 8 Under responsibility, the third item, developing a riskbased annual plan for review, when will we might expect 9 10 that plan? MR. LAWLER: I'm currently in the process of 11 gaining an understanding of the agency's operations, as 12 13 well as bringing on board staff to assist in that process. My hope is that I have something for you sometime this 14 15 summer, with an eye towards focusing on fiscal year '13 16 and possibly a truncated plan for the end of 2012. 17 MS. JOHNSON: Thank you. MR. BUTLER: Mr. Chairman, I make a motion we 18 19 adopt this Internal Audit Charter. 20 MR. VANDERGRIFF: We have a motion. MS. JOHNSON: I'll second it. 21 MR. VANDERGRIFF: We have a second from Vice 22 Chair Johnson. Any discussion, questions? 2.3 24 (No response.) 25 MR. VANDERGRIFF: Please raise your right hand

ON THE RECORD REPORTING (512) 450-0342

in support of the motion.

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(A show of hands.)

MR. VANDERGRIFF: The motion carries unanimously.

Thank you, Bill. Appreciate your work.

For the members of the audience, I'll let you know that we're going to pick up item number 4.C, which is the specialty plate designs, and then we'll come back up the agenda to 3.A, and then proceed at that point back through the agenda in the normal course which would pick up 4.A, 4.B and then the briefing items, moving into conclusion of the meeting.

So with that, I would call on Randy Elliston for the specialty plate designs and the presentation. And I do note for the record that we do have some speakers that will speak on a particular plate.

MR. ELLISTON: Mr. Chairman, members. For the record, my name is Randy Elliston. I'm the director of the Vehicle Titles and Registration Division for the department.

Item 4.C on the agenda is before you today a request from the state's specialty plate vendor to approve five specialty license plates. These plates are listed in our board book, they are to the right here on this board. They're the Calvary Hill plate, the Keller High School,

Michigan State University, University of South Carolina, 1 and University of Louisiana license plates. 2 3 The plates before you have met all legislative and agency rule requirements to be considered for approval 4 by the board, and we now ask that you consider these 5 6 plates as presented. 7 MR. VANDERGRIFF: We do have one particular 8 plate which would be 4.C.1, the Calvary Hill plate, that 9 we do have a couple of speakers that wish to speak, one for and one against that plate. I would ask on the other 10 four plates, perhaps, if the board would like to take 11 those up in one motion for approval or what your pleasure 12 13 would be, versus holding those up particularly with the one plate that we do have some speakers on, so carry that 14 15 individually, I guess, is what I'm asking. 16 MR. INGRAM: I can do that. I make a motion to 17 approve the plates 4.C. is it 2 through 5? MR. VANDERGRIFF: Yes. 18 19 MR. WALKER: That will be my motion. 20 MR. VANDERGRIFF: All right. MS. RYAN: Second. 21 MR. VANDERGRIFF: We have a motion from 22 Director Ingram, second from Director Ryan. Do we have 2.3 24 any discussion?

ON THE RECORD REPORTING (512) 450-0342

MR. WALKER: And the motion is to accept plates

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2 through 5?

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MR. VANDERGRIFF: Yes.

MR. VANDERGRIFF: Seeing no indication of any discussion, please raise your right hand in support of the motion.

(A show of hands.)

MR. VANDERGRIFF: Motion carries unanimously.

I'm sorry. Did you vote against that?

MR. WALKER: There's two against.

MR. VANDERGRIFF: Two against. I apologize.

MY reflex motion, I saw hands go up. So the motion passes

by a five to two vote, with two votes, Vice Chair Johnson

and Board Member Palacios, voting against the plates. And

again, we have two members absent today.

The other plate that we have before us is the Calvary Hill plate, and we do have two speakers, moving to that plate, that would like to speak, one for it and one against. I would like to call Jonathan Saenz to speak, and he's speaking for.

MR. SAENZ: Good morning, members. Thank you for having me. My name is Jonathan Saenz, director of legislative affairs. I'm also an attorney for Liberty Institute. We're a non profit legal and policy organization focusing on constitutional rights, specifically religious liberty issues. We have six

attorneys on staff and we've litigated issues before the Texas Supreme Court, winning three religious freedom cases in the past five years before the Texas Supreme Court.

I've also been active in the U.S. Supreme Court as well, and worked on defending the Ten Commandments displayed on the Capitol grounds as well, and that was successful at the U.S. Supreme Court, along with General Abbott.

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We are in support of this license plate. As I think the members are aware, the One State Under God phrase has been approved by the legislature, was challenged in federal court, and was held by the federal court as constitutional, so you know that the phrase is fine, that there's nothing wrong there. And the reason I'm testifying is because there's been some articles out here and some folks that have expressed their opposition to this, and they may bring up arguments of things being unconstitutional and things like that. Our group, we specialize in this area of constitutional law and there's no constitutional infringement by having a specialty license plate of this manner.

What we know, this is private speech. As you're well aware, when someone purchases this license plate, this is a message and a phrase that they choose, not the state, these people individually choose to put this on the back of their car, the front of their car, and

so this is private speech. And this is such a fundamental issue.

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I'm sorry. How much time do I have? I don't if I got that.

MR. VANDERGRIFF: You did not, but I will give you five minutes.

MR. SAENZ: Thank you. Just so I know where my bounds are.

MR. VANDERGRIFF: And I think we're probably about at a minute and a half.

MR. SAENZ: Okay. Thank you, sir.

So we know that private speech of this manner is well protected in the Constitution and the Supreme Court. We know that particularly religious free speech, being a part of our first amendment, is very well rooted in our constitutional principles, in U.S. Supreme Court precedent, and so we know that there are tremendous protections when people choose privately to put a message, whether it's on the back of their vehicle or somewhere else.

And there's a lot of history here too as well as what the state has been involved in, so we know that this phrase "One State Under God" meets constitutional muster, it's already been challenged and been upheld, and really, I don't think there was anyone that was that

concerned. We knew that there was history in the "One Nation Under God" these phrases that are part of our tradition and history, but nonetheless, there was a lawsuit and that lawsuit was disposed of.

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But also, just to look at the other plates that have been approved, you've got the El Paso Mission Valley specialty license plate that has two crosses on it which benefits the Socorro Mission. You've got the University of St. Thomas, their graphic has one cross on it. The Knights of Columbus which we know is a religious Catholic organization has the phrase "One Nation Under God" as a part of their specialty license plate. God Bless Texas, God Bless America. Southwestern University has a cross and a church as a part of their graphic. And the University of Mary Hardin Baylor also has a church as a part of their graphic. So this is nothing new that we're seeing here, and very similar to other plates that have been approved before.

So I understand that people do have the right to oppose or bring their viewpoint, but approving it is nothing new for this board and it meets constitutional muster. And as of my understanding, the funds are to benefit at-risk youth and I think that a lot of people would feel really good about that endeavor.

And unless there are any questions, I'll be

happy to answer any of the board members.

MR. VANDERGRIFF: Do any of the board members have any questions of Mr. Saenz?

(No response.)

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MR. VANDERGRIFF: Don't believe so at this time. Thank you very much.

MR. SAENZ: Thank you so much for your time, and we ask you to approve the plate.

MR. VANDERGRIFF: The next speaker we have is speaking against the plate, and that is Susan Pintchovski.

MS. PINTCHOVSKI: Good morning, Chairman

Vandergriff and members of the board. My name is Susan

Pintchovski, and I'm here to speak on behalf of the Texas

National Council if Jewish Women, and as co-chair of State

Policy Advocacy Network.

The National Council of Jewish Women is a faith-based volunteer organization inspired by Jewish values and dedicated to improving the lives of women, children and families and to protecting civil liberties and individual freedoms. We have over 3,000 members and supporters in Texas, with major groups in Austin, Dallas, Houston and San Antonio. NCJW believes that the protection and preservation of the constitutional principles of the separation of church and state are keystones for a free and pluralistic society.

The National Council of Jewish Women is outraged by the Calvary Hill plate and its violation of the First Amendment to the U.S. Constitution. The establishment clause of the First Amendment prohibits federal, state or municipal establishment of a religion or other preference for one religion over another. Even as an optional specialty plate, it is still an official State of Texas plate.

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Texas is a diverse state with many religions.

To equate Texas as a Christian state is both untrue and unconstitutional. As a state we must value diversity, foster mutual understanding, and respect for all.

Government protects religious freedoms when it chooses to stay out of matters of faith.

We urge the Department of Motor Vehicles Board to vote against the Calvary Hill plate. Thank you.

MR. VANDERGRIFF: Do any board members have any questions?

MS. JOHNSON: I do. I don't want to brutalize you guys, so I'm just going to ask what brought the attention of this particular plate to the attention of your organization versus the other ones that Mr. Saenz mentioned?

MS. PINTCHOVSKI: Well, first of all, this is one that has come, and as far as the ones that he

mentioned, if I saw those other plates, I would probably have a similar objection. They are not plates that I am aware of, but definitely if they were up here today, they would be grouped in the same category. There is a preference being shown, and as state officials, it is your job to not show preference for any religion, or non-religion over a religion, or religion over non-religion. It's part of our establishment. So I am hoping that you will keep in the spirit of what was done before, I have no history of, but it does not mean we have to repeat that mistake.

MR. PALACIOS: I have a question. It's my understanding that almost any group can petition for a plate, so as far as preference, let's say Muslim or Jewish groups came and they had the same ability to have a specialty plate, would you object to those as well?

MS. PINTCHOVSKI: Absolutely, absolutely. We do best, as representatives of a state department, we do best by staying -- we protect religious freedoms when we stay out of these matters. I would not want to see the Star of David up on a plate or any other, because it tells those that there is something they are not part of. And if this was not a state agency, that's a private affair, but because this is a state agency, you represent all of us, and so to approve this plate is actually showing a

preference for one religion over any other, and I would not be in favor of having my religion or the Muslim religion, any one up on a plate. It has no business there, period.

MR. VANDERGRIFF: Mr. Walker.

MR. WALKER: Susan, don't you believe that those plates, we've sold and created hundreds of them at this point in time, that each of those plates says something not about the State of Texas but it says something about who I am? For example, there's a plate right there we just approved that's got a Trojan soldier on it. Does that mean that the State of Texas supports Trojan soldiers in the state of -- what state is that from -- Michigan? Does the plate below it mean that the State of Texas supports that's a chicken on that one below there, I think.

MS. JOHNSON: It's a gamecock, Mr. Walker, South Carolina.

(General talking and laughter.)

MR. WALKER: I think that all of those plates allows an individual, just as it allows you as an individual, it's not a statement by the State of Texas saying that I'm an Aggie or I'm a Longhorn or I'm a Michigan or a Fighting Gamecock, it says that this is my preference in life, just like I support cancer research,

we have a pink ribbon out there for the Susan Komen, and we represent all kinds, and I think it's just merely a way to allow people individually, not the state, but it allows people individually to say this is who I am.

And I sure respect the fact that you're a Jewish woman and if you wanted a menorah -- I'm sorry?

MS. PINTCHOVSKI: With all due respect, sir, I think everyone has that right to personally have their expression of what they want to say, but to be quite honest, that's what bumper stickers are for, not official state plate.

MR. WALKER: That is a bumper sticker.

MS. PINTCHOVSKI: No, it's not. It's an official state plate. There is a very big difference between a bumper sticker and the state taxpayer money going into getting involved in any of this. The waters get muddled. You can't justify this. So to really support and respect the diversity of everyone who lives in this state, it is best not to show preference. Even though it might be a personal preference, the State of Texas is producing these plates.

So as I said before, it shows preference for one religion over another, that's a violation of this established clause of the First Amendment of our Constitution. And other than that, I just believe it's

not the right thing to do. I personally believe we can 1 express our opinion but it doesn't have to be officially 2 3 endorsed by the State of Texas when it comes to matters of religion which is separate from our state. 4 MR. BUTLER: Mr. Chairman, I'd like to make a 5 6 motion. 7 MR. VANDERGRIFF: You're making a motion to 8 approve? 9 MR. BUTLER: Yes, I am. 10 MR. VANDERGRIFF: We have a motion to approve. Do we have a second for that motion? 11 MR. WALKER: I second it. 12 13 MR. VANDERGRIFF: We have a second for the motion from Mr. Walker. Do we have any discussion? Ms. 14 15 Johnson. 16 MS. JOHNSON: I'd like to make a statement. 17 I'm a staunch constitutionalist and definitely support free speech, and I'm also a Christian and I do support the 18 19 cause of this plate, but I'm joining Member Rodriguez's side of this as we've gone truly too far with these 20 programs and it's time to forget the money that's involved 21 22 in them. If this is a profit issue, when you look at all

MR. PALACIOS: May I make a statement as well?

the research, this is all about money, and I think it's

time to return this matter to the Texas Legislature.

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MR. VANDERGRIFF: Please.

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MR. PALACIOS: I am a staunch Christian as well, and I concur with Cheryl and Member Rodriguez. I believe these plates are not to be personal adornments and that's where we've taken these now. I do agree with the statement about bumper stickers, that's where you express yourself and so forth, and we've just gone too far. And I believe this needs to be reviewed again and it's not really for a board to decide what cause is just, which one is not, they're all great causes. There's other places where we can express ourselves, and that's why I won't support these.

MR. INGRAM: And I'll just tack on that we're approving a plate design, we're not endorsing anyone, to my knowledge, so we're just approving a plate. I'm not endorsing anyone on this list, so that's all we're doing.

MR. VANDERGRIFF: Anything further?
(No response.)

MR. VANDERGRIFF: I do want to make one point beforehand, and I'm sorry to put a little levity in this, this is a very serious moment, but as a University of Southern California Trojan, I want to point out that that is a Spartan not a Trojan. It's a Spartan, that's Michigan State Spartans, and I'm sure that the Michigan State fans who want to buy that plate would want to note

that they're also a Spartan as well. So just want to make sure.

MR. WALKER: Well, when I was at A&M I was in an outfit called Trojan 12 and we had a very similar emblem to that called a Trojan.

MR. VANDERGRIFF: I understand that the Aggies have their own unique way of looking at everything, so I'm not disputing that unique way of looking at things.

(General laughter.)

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MS. RYAN: I have a question before we vote.

MR. VANDERGRIFF: Please.

MS. RYAN: With the comments that were made, and I agree that we're not endorsing a particular organization or school but approving a plate, with the comments that have been made and the concerns that have been raised, how is it that we take up the matter, because it seems to come up with individual plates. Is it possible for us to take up and review a lament or put additional guidelines moving forward? Because we can't do it now, the rules and the law is in place and we have to respond to what's there, but there is a desire, based on the statements, what would be the process to do something like that?

MR. VANDERGRIFF: Mr. Bray, do you want to address that?

MR. BRAY: Transportation Code 504.801 gives 1 you about three or four different reasons for denying a 2 3 plate, one of which is that it offends any member of the public, but at the end of the paragraph it says or for any 4 rule that you enact. So the process would be for you to 5 6 enact rules that firm it up more to your liking. 7 MS. RYAN: And we would put those out for 8 public comment. MR. BRAY: You would go through the normal 9 10 administrative rulemaking process. MS. RYAN: I'd like to say it seems like it's 11

MS. RYAN: I'd like to say it seems like it's created enough conversation that it might be something we take up, I'm not sure when, but at least for discussion and consideration on whether that's something we want to do.

MR. VANDERGRIFF: Well, we certainly can, and we have the ability. Our enabling legislation calls for us to periodically ask the legislature and make recommendations to them, certainly coming from reports from the chair in that regard, so I think can. We certainly definitely moving forward can take this up as an issue.

Mr. Elliston.

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MR. ELLISTON: If I could make one comment regarding that. We are currently in the process of

reviewing proposed standards for license plates, and it goes along with what Member Rodriguez had talked about about standards. Now, it's not about what's on the plate but it's about how the plate is designed and those sorts of things, so we'll be bringing something like that pretty soon as far as standards go, but that is basically what it looks like. The content that is on it is another issue. So just so you're aware, we are in the process of doing some of those things but the content was not one, other than what's already in the rule, that we're addressing.

MS. RYAN: Thank you.

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MR. WALKER: Can I ask Mr. Elliston a question?

MR. VANDERGRIFF: Yes.

MR. WALKER: I know that we still go out for public comment on the license plates. Correct?

MR. ELLISTON: Well, we post them on what we call an e-view. It's a forum for the public to make comments about the plates on the internet.

MR. WALKER: And I know we used to get a copy of that, we didn't want to see that anymore, but we have the right, I think we've maintained, that we can go back and ask what the public comments about, the numbers. What did we see on this particular plate, what the numbers or comments, or do you know, from the public?

MR. ELLISTON: Well, the best of my

recollection, we received about 120 comments or so on that license plate, about 116 of them were not in favor of the license plate, I think three or four were in favor of the license plate. But as we talked about before, where do those comments come from. Our research showed that a lot of them came kind of from a similar location, so it's hard to judge based on that and that's why it's not very beneficial to the board because one group can really generate a lot of comment.

MR. VANDERGRIFF: And that's why the board decided not to put those in the official packets.

MR. ELLISTON: Yes.

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MS. JOHNSON: However, according to 504.801(c), if a member of the public might be offended then we're not supposed to approve these plates.

MR. ELLISTON: It's your option.

MR. BRAY: And that really is not a workable standard when you emphasize it in that way because every one of those plates would probably offend me, and there is someone in Texas that will be offended by every plate that exists, so that's not the standard. And as we kind of discussed last month, you kind of have to reach over a threshold, and I believe the board found that the plate they denied last month met the threshold of offending too many people and creating too much likelihood of problems,

unsafe issues, all those kinds of issues. So that language is there but I just don't think you can employ it the way that you're emphasizing because we wouldn't have any plates at all.

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MS. JOHNSON: But we have 116 negative comments out of 120. Is that what you said? Did I hear that correctly?

MR. ELLISTON: Yes, ma'am. But on the other side of that, too, that's 120 comments we received out of the millions of people that live in the State of Texas, so there's no statistical way to draw any analysis out of that small sampling of information, and that's why you chose that the board didn't want to see that information. We review it in case there's anything that maybe we missed something in the design of the plate, but as far as can you judge do the people of Texas like that plate or not like it, you just can't draw that conclusion based on the information we get in that forum, in my opinion.

MR. VANDERGRIFF: Any further questions? (No response.)

MR. VANDERGRIFF: I'd like to make one point because I do think that this issue with respect to -- I echo the comments of the vice chair and Mr. Palacios that this is an issue that perhaps the legislature should help us provide some guidance on this particular one again.

So with that, I will call for your vote. 1 All those in favor of this plate, please raise your right hand 2 3 in support of the plate. (A show of hands.) 4 MR. VANDERGRIFF: Four members four it. All 5 6 those opposed please raise your hand. 7 (A show of hands.) MR. VANDERGRIFF: There's three opposed, so the 8 9 plate passes four to three. 10 We're now going to move back to the top part of our agenda, and that's item number 3.A which we're 11 bringing back up again the case that we tabled for the 12 13 last meeting, and that's the Star Motors case versus Mercedes-Benz. I would ask the representatives of the 14 15 parties is ten minutes enough for each side? Would you 16 prefer more time? It's up to you. MR. COFFEY: I'm sure ten will be more than 17 enough. 18 19 MR. VANDERGRIFF: And obviously, that's not inclusive of any questions that you would have. 20 So, Mr. Coffey, would you like to proceed to 21 22 address us? MR. COFFEY: Thank you, Mr. Chairman, I would. 2.3 24 Just to refresh your recollection, my client, 25 Star Motor Cars, has filed an interim appeal to SOAH

orders which have the effect of consolidating two cases and allowing them to go along side by side. The two cases consist of an incentive program case that my client brought against MB USA some years ago.

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He believes that any program which ties competitive advantage to various operational objectives that the manufacturer distributor wants to achieve violates various sections of the Code, including Section .468 and .467, .468 because it discriminates between dealers and the particular program involved here is particularly discriminatory because unless you are a dealer in good standing -- which is something that MB USA has made up -- unless you are a dealer in good standing, you can't even participate in the program. If you can't participate in the program, you're basically put at a 3.5 percent margin disadvantage with the dealers who can participate in the program.

What it takes to be a dealer in good standing is you have to sign the most recent franchise agreement which in this particular unique case has been invalidated by this very board --

MR. VANDERGRIFF: The predecessor board.

MR. COFFEY: -- the predecessor board. Thank you, Mr. Chairman. It was the MVD as opposed to the DMV.

-- invalidated by this board and you cannot be

in any litigation within the USA which is, of course, the whole point of bringing the incentive program case to begin with because we're being discriminated against, we can't compete. Now Mercedes-Benz comes along and wants to terminate my client because his performance is low because he cannot do the same deals in the city of Houston that the rest of his competitors can do.

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So what the interim appeal all boils down to is what the effect of Section 803, the statutory stay mechanism that was passed back in the early 1990s. We believe it was designed to stop precisely what is going on in this case. When a dealer, or for that matter, any party comes along and challenges a manufacturer or I suppose another dealer on something that they are doing, they should be allowed to do that in peace, they should not have to face a termination case brought back against them when they bring the incentive case and have to fight for the life of their business.

The chairman, I think, said it best: it is effectively a whistle blower statute. If, in fact, somebody comes along and says the other party to this relationship is violating the law and the other party says well, before you get to prove that, we're going to terminate you, that is precisely what Section 803 of the Code was designed to stop. Now, I know that personally

because I was involved in the legislative process way back when, but that's not really the proof that I offer this board of what 803 means. It is in the legislative history. It specifically says that 803 is designed to preserve the status quo between parties and to end the kind of activities which would disrupt or destroy the business of the party who is benefitted or protected by Section 803.

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So that's what this interim appeal is all about. We are simply saying the SOAH ALJ does not know the precedents of this board, they don't understand the statute, they were misled somewhat by opposing counsel with snide innuendos suggesting that my client is doing something wrong to hurt the public and they ought to be able to come along and terminate. You heard at the last board meeting, those of you who were present, that that is not the case. I specifically challenged that kind of tactic and Mr. Ferguson stood up and said Mr. Sireau, the dealer principal, is not doing anything wrong, he corrected the record on that.

I think if that kind of tactic had not been used with SOAH, we wouldn't be here today because we wouldn't need to be.

So all we are simply asking is that if they want to terminate us, they need to wait their turn, they

need to wait until we finish our Star 4 incentive program case in peace, then if they think they can terminate us, we'll zealously defend that, but they can't do it as a reaction to us bringing Star 4.

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MR. VANDERGRIFF: Could they not, if they went back into Star 4 and requested a lifting of the statutory stay to address the termination issue? They do have that right to do that, do they not?

MR. COFFEY: They do have the statutory right to do that.

MR. VANDERGRIFF: I'm not saying you're agreeing with that, but they do have the right to do that.

MR. COFFEY: Exactly, Mr. Chairman, they do have the right to do that. And of course, the relief that we have requested from this board is that you order the SOAH ALJ to abate the termination proceeding until we have completed the incentive program case. That's within your discretion whether you grant that specific relief. If you're going to send it back to allow them to move to lift the stay, then certainly we will be able to deal with that in its proper course and we will defend against that and do our best to get the SOAH ALJ not to do that.

But the whole purpose of 803 is to allow a party to complete his case in peace without having to defend the life of his dealership. I explained to you

last time, and I know that those of you who are dealers are aware of it, all it takes is a rumor of a termination and you've got problems. You've people leaving, your best people which further reduces your performance which gives them more grounds to try and terminate my client.

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So we're here asking for relief, we want it stopped, we'll finish the incentive program case, we'll come here with a final order, once we have a final order, whether it's for us or against us, then they can continue their termination case. So that is our plea to you and we hope it will be granted.

MR. VANDERGRIFF: Mr. Ingram.

MR. INGRAM: I might have got confused somewhere along the way, but it seems like somewhere in there you were mentioning that during the Star 6 case that Mercedes-Benz brought forth information to the ALJ that would say this is the harm that's being done, this is the problem, this is what we've got, and the ALJ at that point decided to proceed. Is that incorrect?

MR. COFFEY: That's incorrect. If I misstated, I apologize. Basically, what they did was use innuendo, they said theoretically, if a dealer was doing -- you heard the very long story that Mr. Ferguson raised last time, basically they said theoretically -- if a dealer is violating the law and hurting the consumer, then Coffey's

construction of 803 would stop us from bringing a termination case. I believe that was designed to taint my client with basically false innuendo.

Now, you heard when Mr. Ferguson got up here last time he admitted my client is not doing anything wrong, they are attempting to terminate for performance. Our position will be you created the circumstances which caused the performance. Until we started beating you in 2000 on these cases, we were an average performing dealer. Well, big surprise, from the minute that decision came out in the Star 1 case in 2000, his performance began to decline.

Now, we're not going to try to try the case before you this morning, but essentially, our defense is you created the circumstances, we're going to prove that they created the circumstances, and then we'll see whether or not we get terminated for performance which is largely a result of what the manufacturer has done in the Houston market.

But no, they didn't accuse us of anything specifically, they didn't put on any evidence, but they used snide innuendo to create the impression that that was what was going on. And I believe that that was a good part of the reason why the ALJ decided well, we're not going to hold off with termination, we'll go ahead and let

it go forward together, and there are some economies of 1 scale in allowing that to happen. 3 I hope that answers your question. MR. INGRAM: It did completely, but I'm sure 4 that once those comments came out that were innuendo, you 5 6 disputed those comments as being not factually correct. Correct? 7 8 MR. COFFEY: Well, we certainly did, but it's 9 hard to dispute a negative. 10 MS. RYAN: As a followup to Mr. Ingram's comment, so the innuendos were there. When the notice of 11 termination was presented, were there causes for the 12 13 termination in that notice? They weren't innuendos. Right? Those were detailed items. 14 15 MR. COFFEY: They were all performance causes, sales performance, CSI was one of them, failure to buy 16 17 enough of their certified lease returns, a number of things like that that's all performance based. There has 18 19 been no allegation that my client was doing anything wrong from a moral perspective. 20 MS. RYAN: So no evidence on either side, just 21 22 this is why and the discussion of whether it should occur. Nothing was presented to back any of that up. 2.3

of that up, nothing at all. And in fact, at the last

MR. COFFEY: Nothing was presented to back any

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board meeting Mr. Ferguson stood up and essentially said,
Star Motor Cars isn't doing anything wrong.

MS. RYAN: Thank you.

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MR. VANDERGRIFF: Any other questions of Mr. Coffey?

MR. VANDERGRIFF: Seeing none, Mr. Ferguson.

MR. COFFEY: Thank you, board members.

MR. FERGUSON: I'm not sure what innuendo I'm being accused of. I've never accused Mr. Sireau or Star Motor Cars of any illegal activity or anything immoral that I know of. If I have, I'd love to hear what it is.

When you heard Mr. Coffey's explanation of why they shouldn't be terminated, he tied it to what? The incentive program. Which is why we moved to consolidate the two actions together because it makes sense to get all of this done at one time and for it to be resolved at one time for the efficiency of the parties and for the fact-finder, the ALJ, and for who's hearing the witnesses to be able to go into both issues. He's just given you the argument, it was my argument for why the matter should be consolidated because of their defense of the termination is you guys caused this by this program and some other things. That's just an aside.

How are we here? How are we here? We're here on them challenging a motion to consolidate and a motion

abate. There's no authority in the Code for those to be before you. The staff recognized that. The executive summary of the staff says Mercedes is right on those points, that you shouldn't hear this appeal. If you don't have the jurisdiction, there's no amount of emotion, no amount of throwing gas on the fire, no amount of accusations that I could sit here all day and say that's wrong, that's not accurate, getting into the merits of the case, but the bottom line is you have to have the jurisdiction.

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And what he is saying is that in Star 4, once Star 4 was started, the incentive case -- which, Member Johnson, I don't know if you've seen the transcript from the last hearing but we've been in litigation with this dealer for 15 years, so looking for a moment when there's not litigation has not been too easy in the history of these two parties, recent past -- but Star 4, which your staff says the ultimate decision-maker is the director of the division, Ms. Cost, so why are you hearing it? She's the final decision-maker, and that's what the staff pointed out is that if this is an appeal out of Star 4, which it has to be, because he's complaining about the termination action which is Star 6. Star 6, it's the board's position that you are the final decision-maker, but that's not where the stay is that he's complaining

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So with all due respect, I understand there's some board members who feel like Mercedes should have come in and asked for a motion to clarify. I would submit to you that equally, if there's a procedural problem here, there's also a procedural problem on the protestant because they're not properly before you. So without adopting or making any policy that runs long term, you can simply do this: say procedurally we don't think this case belongs before us, parties go back about your ways and do what you think you need to do to protect your interests. If they want to file a motion for a cease and desist order, they can do that before the SOAH judge. If they want to ask to clarify the stay, they can do that and we can go on our way and try our cases and get these two parties resolution at least on these issues and go forward.

Otherwise, I would suggest to you that you're going to lead to further litigation and further cost, not only to the parties but to the State of Texas by stepping into areas that the jurisdiction on this particular issue and this particular matter doesn't exist. It may be messy mess but that doesn't mean you need to get your hands dirty with it by picking up something that's not yours. You should say to the parties: This doesn't belong before

us in the current format, we're not endorsing anything, in fact, we think in the future the parties would be well served to file a motion to clarify a stay. Put that in your order if you want to. If you want to send a notice to the industry, say: We think this should have been done but this isn't properly before us. That will send a signal if you want to send a signal.

But just like dealers have rights and they should be protected, the manufacturers have rights too, and there's no right of anybody to say you can't touch me, you can't terminate me. And we used the illustration of what if the dealer shut down for a month, and the argument they were making to the SOAH judge, we were stuck with that and that's what we talked about. If a dealer just shut down, they're saying we can't terminate him? If a dealer committed some crime? They knew we weren't accusing this dealer of a crime, but it's the illustration, and the ALJ looked at that in the context of how broad the stay was in connection with the motion to abate, and said, No, I'm not going to abate this case because it doesn't apply.

Mr. Coffey says, because I think it's the popular thing to do to come before you and slam the SOAH judges. It wasn't popular when the cases got removed to SOAH, there were some hurt feelings over that, so let's

slam the SOAH judges, they're stupid, they don't know what they're doing, they don't know how to read this act.

Well, apparently your staff doesn't either, because if you read the executive summary, their conclusions line up with what SOAH said. So I guess everybody is stupid then, everybody must be stupid.

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But see, it's about emotion. If I raise my voice, if I say bad things are happening, oh, well, once a termination is filed, people start leaving. Well, that happens whether there's an incentive protest or not. Any issues that flow from a notice of termination, whatever those may be -- and I'm not necessarily agreeing with this -- but even those that there may be would flow regardless. And as I said last time, if you stop us, when would we get to go? The day after a final order is entered in the incentive case then we get to go? What's the sense in that? And again, that's into the merits.

And with all due respect, I think your staff has pointed out the safe harbor where you ought to go, where the law goes, and that you don't have the jurisdiction to consider this appeal because it's not a proper motion before you and it doesn't belong before you.

That's really the extent of what I have to say.

MR. VANDERGRIFF: I'm going to ask a couple of questions but I'm going to make a couple of points. I

think you are aware that the board has gotten some, frankly, not necessarily contradictory but somewhat conflicting advice from the lawyers that represent us, so I hope you do appreciate that we've heard from some point of view that we do have some authority and ability to intervene in this case or to act, and then we have had some that said we haven't, so please recognize the board is grappling with that issue.

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The second is I want to address one point. Certainly this board has not publicly, or to my knowledge, privately, members of this board indicated that SOAH judges are stupid. We're very appreciative of the work they do. The transfer was done before this agency was I think at the time it was supported by both created. dealer representatives in the form of the dealer association and by manufacturer representatives. understand and appreciate that support for that, so I want to make sure that that's clarified, this board does not think the SOAH judges are stupid, does not think they do a poor job per se. We certainly believe that we should have a better line of communication between what we do and what they do, and I think we can work to get that kind of relationship better. So I want to note those two things.

A question I'd ask you that just runs through my mind, and whether this is procedurally correct or not

or whether you had to do this or not, why didn't Mercedes-Benz file to lift the stay or to clarify the stay? Why didn't they do that in the Star 4 case versus file a separate Star 6 case, or what's been called Star 6?

MR. FERGUSON: Well, yes. And Mr. Chairman, back to your comment about the SOAH judges, I wasn't suggesting the board would make those comments, and I apologize if I came across that way because I don't believe that.

We did not believe that the stay applied. If there is a stay, the stay says you can't do anything to affect anybody's legal rights. Their legal rights before the incentive case was filed were that if we filed a notice of termination, they had a right to protest. Their rights after the incentive case was filed were if we filed a notice of termination, they had a right to protest. So we have not impacted that right at all. They never had a right not to be terminated, and so we didn't think it applied.

In the order that I hope the board members have read that the SOAH judge wrote, he explained that and the staff also explained that, that the stay does not extend to that. The stay, if you will, is more of a shield of you can't take things from me that I have a right to. It can't be used offensively as a sword. You don't gain

rights by having a protest going on. And so they never had a right not to receive a notice of termination. They had and they still have the right to challenge any termination that is brought.

MR. VANDERGRIFF: Well, and I understand, and I certainly don't think, at least I as one member of this board, am not trying to suggest that Mercedes doesn't have the right to issue a termination notice, I'm just curious as to why. I'll ask this question: Is the normal practice, if there is a dispute between parties that's in litigation, is the normal practice in your 30 years plus of doing this, would it be to go before that same body and request clarification on the stay, that this is not applicable?

MR. FERGUSON: If I thought it was a close call, I would do that. If I thought there was a question about that, I would do that. In this case, I did not see that there was any question.

MR. VANDERGRIFF: And why?

MR. FERGUSON: Because the stay, to the extent there is a stay in the incentive program case -- and I won't go into that -- but assuming there is a stay, it does not take away Mercedes's rights to follow the Code and do a notice of termination. It doesn't take that right away. It doesn't say there's a stay in place and

you lose rights, it says you can't do anything that would affect a legal right of the party. We haven't done anything to affect a legal right of the party. They had a right beforehand to protest any termination, they had a right afterwards.

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As the SOAH judge said, if this is retaliatory -- either the SOAH judge or the staff or both, I apologize, I can't remember which now -- if this is retaliatory and not a good termination, then that will come out in the evidence and that will be proven. It is what it is.

MR. VANDERGRIFF: So a different tack on the question. Now that the cases at SOAH have been consolidated, what is -- forget for a second whether this board has a right to make a ruling or not, whether we have jurisdiction or not -- what is the natural effect, in your mind, of the cases being consolidated, if it went back before the SOAH judge as planned, I guess in February it goes back before the SOAH judge, what's the practical effect? I think you said earlier in your comments to us that the two cases will be decided at that point. They may be separate decisions.

And by the way, I need to note for the board -- I apologize -- you had sent a letter to me today. I assume Mr. Coffey has a copy of this letter.

 $$\operatorname{MR}.$$ FERGUSON: We sent it out yesterday afternoon.

MR. VANDERGRIFF: This letter indicates that either we can do this or certainly you notified SOAH that we'd like to have two separate final decisions in this matter to clarify if it was consolidated and heard that way. But what's the practical effect of the consolidation, if you will? Are the two matters going to be heard at that point, in essence concurrently?

MR. FERGUSON: Yes. The discovery is ongoing. We have recently submitted an agreed motion to reset the cases -- they're already set at the same time, change the trial date due to some other issues.

MR. VANDERGRIFF: It will be a later date?

MR. FERGUSON: Yes. The discovery is going forward, witnesses are being deposed simultaneously on both issues, if you will, and when it's tried the issues

will be tried together and hopefully, as we have asked in the letter, there will be separate PFDs. And then as I

20 understand the board's wish is that Star 4 goes to the

21 director of the division and Star 6, the termination case,

22 comes here.

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MR. VANDERGRIFF: And last question.

Originally when this case, when Star 6 came up, you did

not seem to indicate -- and I'm not trying to retry that

case or review the facts of that case, but if my memory serves me correctly, there was no indication from you in the initial presentation to the SOAH judge that there might be a question of who heard this case and who didn't in terms of a final decision-maker. Was that considered, was it even of relevance at that point in time?

MR. FERGUSON: I don't remember bringing it up.

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I honestly do not know if the SOAH judge therefore knew that or considered that. I know the SOAH judge talked about the efficiency of putting these matters together because they are interwoven, as you heard in the original presentation, and so for that standpoint, that's why they did that.

Would the judge, if we said you're going to have to write two separate PFDs, would that change anything? I can't speak for them. I know we have two separate SOAH judges who are hearing this, so they've doubled up on us and I'm not sure all the reasons why behind that.

MR. VANDERGRIFF: Any further questions from board members?

MR. WALKER: I have a question.

MR. VANDERGRIFF: Please, Mr. Walker.

MR. WALKER: Is there a franchise agreement in effect today?

1	MR. FERGUSON: Yes, sir.
2	MR. WALKER: Which franchise agreement do you
3	think is effective?
4	MR. FERGUSON: There is a 1988 passenger car
5	agreement and a 1997 light truck agreement.
6	MR. WALKER: But I need some clarification on
7	these franchise agreements. The 1988 franchise agreement
8	says this is the deal between Mercedes and Star Motors
9	when it originated. The 1992 agreement is we're adding a
10	new line of vehicles to your deal, is this all new
11	encompassing, '88 goes away?
12	MR. FERGUSON: Two separate agreements: one
13	covers passenger car and one covers light truck.
14	MR. WALKER: So there's two franchise
15	agreements.
16	MR. FERGUSON: Yes, sir.
17	MR. WALKER: But the franchise agreement 1988
18	is not in compliance with I think it's his contention
19	that it's not in compliance with the state laws. True or
20	false?
21	MR. FERGUSON: I don't believe that assertion
22	is to the '88 agreement. The '88 agreement has never been
23	challenged or come before the board.
24	MR. WALKER: So the '92 is the disputed
25	franchise agreement?

MR. FERGUSON: The 1997 agreement was signed by 1 2 Star Motor Cars to become a light truck dealer. Five 3 years later -- as Mercedes does, they come out with a new agreement every five years -- they came out with a new 4 agreement in 2002 that they offered to passenger car 5 6 dealers and light truck dealers. Now, you may be saying why is Star on an '88 passenger car agreement. Because 7 8 they haven't signed the other agreements that were 9 offered. Mercedes sent all dealers 2002 agreements, 10 passenger car and light truck, those agreements mirror 11 each other. Star challenged those agreements, certain things were found to be okay, certain things were found 12 13 not to be okay, so the final order that came out of the board was: you don't have to sign the 2002 agreement. 14 15 MR. WALKER: But you have multiple other 16 dealers in Texas alone that did sign the 2002 agreement. 17 Is that correct? MR. FERGUSON: And the 2007 agreements. 18 19 MR. WALKER: And the 2007. So everybody else that you have deals with has the agreements and agreed to 20

Is that correct?

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MR. FERGUSON: That's correct.

the agreements, but Star refuses to sign their agreement.

MR. WALKER: So I have a question for Mr. Bray.

MR. BRAY: Before you ask me a question, I'd

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rather not become embroiled in a debate with the attorneys 1 2 making presentations. 3 MR. WALKER: I just want to know what the State's opinion is about franchise agreements. Or Victor, 4 can you help me? 5 6 MR. BRAY: I don't mean to cut you off, I'll entertain the question, but if you're -- let me try to 7 8 help you. What's the question? MR. WALKER: In the business world I live in, 9 10 you have agreements that are signed between two parties that say this is how we're going to do business, and 11 franchise agreements, I assume that the State of Texas is 12 13 involved in those and says you have to have these agreements in place and it must meet certain guidelines 14 15 and specifications to have it. Right? MR. BRAY: The State of Texas is not involved 16 17 in the franchise agreement, that's between the parties. The State of Texas requires a franchise agreement in order 18 19 to get a new motor vehicle dealer license. MR. VANDERGRIFF: And at times there is 20 language in our statutes that say notwithstanding the 21 22 terms of the franchise agreement, these things apply. MR. BRAY: Many times. 2.3 24 MR. WALKER: Go ahead. Help me out. 25 MR. FERGUSON: I try to help you out.

the wrong direction, just stop me.

MR. WALKER: I'm just trying to figure out why there's some disputes, why won't they sign your agreement if the other one is not compliant.

MR. FERGUSON: One of the provisions I think that Star challenged was after hours delivery. Mercedes had in their standard agreement with all the dealers that you will have a place that is accessible for us to make after hours deliveries, because a lot of times they're bringing in big loads of trucks that may have parts on it or it may have vehicles on it or whatever, and moving in through metropolitan areas it's easier to do it in the middle of the night, if you will, than it is to do it in the middle of the day. Star challenged that and said that doesn't fit our business model and gave reasons why, and I believe they prevailed on that point as that that was a provision that was found that we didn't have good cause for putting in their agreement.

Say Member Palacios was a Mercedes dealer and he said, Deliveries in the evening, sure, we would love to do that. So he doesn't challenge it. So it's possible where you could have dealers on different agreements because their business models are different and how it impacts one might not be how it impacts another. So you

could have an agreement that is legal but the dealer doesn't have to sign it.

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MR. WALKER: Agree to all of it.

MS. RYAN: And Johnny, what I'll add to that is from my perspective and what I've seen, state law would supercede, so even if the franchise agreement states X, most will look at individual state laws and default to that even if it doesn't match what's in the agreement. So you're always in consideration of what that individual state's law states. I don't know if that helps.

MR. WALKER: We might be headed down the right road, but it just appears to me in all the things I read here is that there's lots of bad blood between the two parties and no matter what's happening, they're always poking at each other as to I'm not going to do this, you're not going to do that. We need to get their resolve on this and get on down the road.

MR. VANDERGRIFF: Do you have a question?

MS. RYAN: I do. I was going to say to try to funnel the discussion maybe in a direction that we might get a decision.

MR. VANDERGRIFF: I think the question at the moment is are there any questions of Mr. Ferguson. If we're moving to discussion, I can let him ease back.

MR. INGRAM: I have one question just to wrap

up, if I may.

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MR. VANDERGRIFF: Please.

MR. INGRAM: I find it interesting that you talk about emotions but why the story at the beginning of your testimony the last time we met? I mean, you gave the rather long story, it was a very interesting story, but what was the point?

MR. FERGUSON: The point was is that their argument before the SOAH judge, and really the root of their argument to you is once we have anything going with the manufacturer, they cannot exercise, the manufacturer cannot exercise its rights. It's King's X, we're on the base holding the tree, and you can't do anything to us. And that's an extreme example to say take that logically and run it out here, is that what you really think is the law and is it what the law ought to be.

MR. WALKER: I get that. I wish that you'd been clearer about why you're telling us that story, but I understand.

MR. FERGUSON: Okay. Well, I apologize.

MR. PALACIOS: I have a question, and I heard something different. You made comments about statutory stays aren't put in place to give a dealer carte blanche protection and so forth, and I see it, the statutory actually gives protection to both parties, manufacturers

and dealers. It would preclude a dealer from, again, having carte blanche, committing egregious acts, thinking I'm protected, I've got this to protect me because the stay is in place, and it protects the manufacturer from those actions. It protects the dealer from retaliation or whatever it may be.

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But you made a comment about the statutory stay does not affect a manufacturer's option to terminate a dealer, and I don't dispute that either -- well, I dispute that the manufacturer will always have an option to terminate, but I still get back to, I guess, your statement about legal rights here. As I read the statute here, Section 803, it says the statutory stay is in place and either party may not affect the other's legal right, duty or privilege of any party before the board.

So my question to you is if it doesn't protect a termination from taking place, then what does it protect? I'm not saying it's a legal right, but it certainly is a privilege of a dealer to have a franchise.

MR. FERGUSON: And in a termination case, and there's other provisions of the Code that go to this, that the franchise agreement remains in place, meaning you can't move to terminate and if they protest you can't stop shipment of cars, stop shipment of product, stop giving them parts because they've go the right to get those under

that dealer agreement. You can't stop that, you can't stop doing business with them, and those are the legal rights and privileges that that is protecting.

And so what I'm saying here is they haven't lost any legal rights or privileges, they're still challenging the incentive program, they have a right to challenge that, and they're still going to have their hearing in that case. And that's why I don't think that a notice of termination changes that, it doesn't change their rights at all, they still have the rights to challenge the termination as well.

MR. PALACIOS: In hindsight, had you been able to -- I guess looking at this now, it appears to me that a lifting of the stay would have made things clear for everyone.

MR. FERGUSON: It would have saved us some time. Yes, sir.

MR. PALACIOS: I don't have anything else.

MS. RYAN: I have a question for Mr. Coffey.

MR. VANDERGRIFF: Let me go ahead and finish with Mr. Ferguson, so do you have any further questions? Because I was going to give him a couple of minutes for rebuttal as well.

(No response.)

MR. FERGUSON: Thank you.

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MR. VANDERGRIFF: Thank you very much. 1 2 Mr. Coffey. And you also get a couple of 3 minutes for rebuttal after this question, if you choose to. 4 MR. COFFEY: Thank you, Mr. Chairman. 5 6 MS. RYAN: We came up and we asked Mr. Ferguson why Mercedes didn't lift the stay. 7 8 MR. VANDERGRIFF: You might go ahead and sit, if you don't mind. 9 10 MS. RYAN: If there is an option to go back to SOAH to clarify the stay or to request a cease and desist, 11 12 why are you not taking that proffer? 13 MR. COFFEY: The last board meeting and your staff recommendation was the first inkling I ever had that 14 15 the only way to get here on an interim order under these 16 facts is to use the cease and desist motion over at SOAH. 17 Mr. Ferguson was the first one to raise that even as a theory. I've never even heard it before. 18 19 We used what we thought was the most direct way of getting here, and that was motions to abate. 20 what you would use in civil court, and so where we don't 21 have any better guidance from the rules or from the 22 statute, we simply go with the Rules of Civil Procedure. 2.3

So we brought motions to abate the termination case, and

Mr. Ferguson, once again with his jurisdictional issues,

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said, You can't get there this way, you gotta go our way.

Well, there's no proof of that, there's no support for it
anywhere, so we challenged, we went through the motion to
abate process, we got denied, and so we brought an interim
order over here.

Apparently your staff agrees with Mr. Ferguson that the proper way to get here is to move for a cease and desist, get it denied, and then make your interim appeal.

I don't see that in the APA. What I see in the APA is that you have jurisdiction to overrule SOAH on any order that they might issue so long as it misapplies or misinterprets agency precedent or applicable law. That's the route we took, we still think it's the best route. If somebody tells us go back and try another route, we'll do that, but frankly, I think the result is going to be the same, we will end up back over here on the same issues, just through a different mechanism.

MS. RYAN: So based on what you just said, you believe the SOAH judge would grant the lifting of the stay and you bring it back here?

MR. COFFEY: Now that we have a record that my client is not doing anything wrong, and all this talk about we gotta quickly terminate him because maybe he's off doing something bad to consumers, now that all that is clearly cleared up on the record, it may be that we will

get a different result.

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But what I heard the SOAH judge saying in all his orders was from a matter of judicial economy, since we have issues between the cases that are the same, since the parties are the same and we're going to be using a lot of the same witnesses, that is the basis for my decision. I also heard him say that you don't need an 803 stay because you have a 453(f) stay which basically says if you bring a termination case against the dealer, you can't go ahead and terminate him, either directly or indirectly, by stopping shipping him cars and that sort of thing. The SOAH judge said that limited stay is sufficient.

What the SOAH judge doesn't understand, and only someone with industry experience would understand -- and I never used the term stupid, I don't know where that came up, by the way, so I'll just put that in in an aside -- what the SOAH judges don't understand is that the distributors and the factories have enormous power over a dealer. Everybody in this industry understands that. They can make your success or they can make your failure in a hundred different ways, and when you have earned the ire of a top decision-maker in a distributor organization like Mr. Lieb -- who, by the way, has since been recalled to Germany for ethics violations -- once you have earned the ire of somebody like that, there are ways to pull the

strings to orchestrate your failure as a dealer. We believe that is what has been going on in this case and we are doing our best to get the discovery out of a guy in Germany to prove it.

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Getting back to your question, they will probably move to lift the stay, the SOAH ALJ is going to have the same dynamics operating in his mind even without the snide innuendo -- which we have now corrected on the record -- he's going to have the same dynamics, he's got a job to do, he has got to clear his dockets within X period of time -- I don't know exactly what their internal rules are but there are pressures on them -- and he is going to want this to proceed just exactly the way he has orchestrated it to proceed.

That is why we are asking this board for the specific relief that you order them to abate the termination case until we can include the incentive case in peace. The reason why that is so important is that when you're under threat of termination, all kinds of bad things happen which further affect your performance.

MS. RYAN: And you shared all that with the SOAH judge at the time the discussion of combining was going on?

MR. COFFEY: To the best of my ability. But of course, he has his own dynamics that he has to operate

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MS. RYAN: I understand there were two sides. 2 MR. COFFEY: Yes, his own dynamics. That is what I believe is going to happen. If we go back they'll 4 move to lift the stay, we'll make all the same arguments we have with you, he's going to be motivated primarily to 7 do what he has done before because of the judicial 8 economy -- which we admit, you know, there are issues in 9 common, his way is a quicker way to do it than our way, 10 but that is not what is of paramount importance. of paramount importance is what the chairman said last 11 time, and that is if you blow the whistle on somebody, you 12 13 ought to be able to continue prosecuting that in peace without having to fight for the life of your business and 14 15 endure all the bad things that happen when the all-16 powerful manufacturer says we're going to get rid of this dealer. 17

> Thank you. MS. RYAN:

MR. COFFEY: Yes, ma'am.

MR. VANDERGRIFF: To make it clear to the board members, I don't think I said it quite like that.

(General laughter.)

MS. RYAN: I was going to talk to you afterwards because that's not what I heard.

MR. COFFEY: I heard the term whistle blower.

ON THE RECORD REPORTING (512) 450-0342

MS. RYAN: That's the beauty of communication, 1 2 we all hear things differently. MR. VANDERGRIFF: And also, if I was a true 3 presiding judge, I'm not sure I would allow the comment 4 about the guy that's now been recalled to Germany for 5 6 ethics violations. 7 Additional questions of Mr. Coffey? 8 MS. RYAN: Thank you. 9 MR. COFFEY: Thank you. 10 MR. VANDERGRIFF: With that, I guess we can close the presentations and the questions to the parties' 11 representatives and I'll submit it to you all for 12 13 discussion. MR. INGRAM: It seems like jurisdiction is a 14 15 key component of this, so to me, we don't have 16 jurisdiction on a combined case, so I don't know how to 17 proceed unless we get this cases split, so that would be my first concern. 18 19 MS. JOHNSON: Would you like a motion? 20 MR. VANDERGRIFF: Sure. MS. JOHNSON: I'm really sticking my neck out 21 22 here because I'm not the auto dealer or manufacturer or distributor expert, but I'm going to move that the board 2.3 24 issue an order requesting the ALJs to separate the two

cases and abate Star 6 while Star 4 proceeds, not

directing that but requesting that. Because I agree with you, I think that these are separate cases and one should occur before the next one begins.

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MR. INGRAM: And my only concern with that, great we're sending it back and splitting it, but I'm not sure that I agree that Star 6 can't proceed at the same time as Star 4. Star 4 might take a long time.

MR. PALACIOS: Well, this is my concern is to protect the rights of both parties. Both parties have a right to have the stay lifted. By abating Star 6, we're essentially -- it seems to me we should allow Mercedes the option of requesting to have a stay lifted. That provision, again, is in place to protect both parties, as I said earlier. It protects Mercedes from egregious acts of a dealer, letting the dealer know they don't have a shield to protect them from any acts once the procedure is put in place and it protects the dealer from retaliation, and I think if we ask for an abatement of 6, we're essentially denying that opportunity.

And again, the whole thing that troubles me here is a process was not followed, and we wouldn't be here, I don't think, had that process been followed, had that request to have the stay clarified, I think everything would have been taken care of. And why it wasn't requested, I don't know, we weren't there and we

heard comments, but that would be my suggestion is to take 1 it back to the courts and request clarification of the 3 stay. Can we modify, suggest to clarify? 4 MS. RYAN: MR. VANDERGRIFF: What's the continuation of 5 6 your thought? 7 MS. RYAN: To request that we separate 8 definitely the decisions. If both parties want to agree 9 to hear the testimony, then that would be something, definitely the decisions, and then send it back to SOAH to 10 clarify the stay, to have them make the decision based on 11 12 coming information. It may be lifted, it may not, I don't 13 know, and I don't know that I have the information to make that decision. And that's in our jurisdiction. I believe 14 15 we're not stepping over bounds, because someone is going 16 to tell me if we are, and Brett is smiling so I'm thinking 17 maybe we are. MR. VANDERGRIFF: Mr. Bray. 18 19 MR. BRAY: You're debating a motion that does not have a second. 20 MR. VANDERGRIFF: Well, absolutely. 21 MS. JOHNSON: So it died for lack of a second? 22 MR. VANDERGRIFF: That's what I was considering 2.3 24 at this point. I didn't officially ask for a second, so I

should ask for a second. Was there a second to the motion

of the vice chair? I didn't see one and I should have 1 2 asked, and I apologize. 3 MR. BRAY: In answer to your question, I don't believe you have authority to order them to do anything in 4 Star 4. 5 6 MS. JOHNSON: Including to separate them? MR. BRAY: Well, but you're not -- if you want 7 8 to request or order to separate, you're talking about Star 9 6 which you do have authority over, it takes it away from 10 Star 4. MR. WALKER: But if we bifurcate this and we go 11 forward with 6 and 4 goes back to SOAH, don't you run the 12 13 risk that with how slow 4 is trudging through the ditches out here, that actually if 6 went forward that the dealer 14 15 could be terminated prior to his day in court to actually 16 hear his arguments as to why he shouldn't be here in the first place? 17 MS. RYAN: My opinion, they'll both be drawn 18 19 out equally as long. I mean, I think that's part of the process. They'll both take a while. 20 MR. BRAY: The reality is none of us know. 21 The reality is the ALJ determines how a case proceeds. 22 MR. VANDERGRIFF: But correct me if I'm wrong 2.3

two cases into one, so the theory is that they're going to

here, but a reality is the ALJ didn't consolidate those

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proceed in decisions accordingly, and although I appreciate all the speculation, all we have is that the ALJ is going to decide these two cases -- I guess it's two ALJs sitting together deciding these cases, so my expectation at this point is that they would be decided concurrently, heard together and decisions made concurrently.

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MS. RYAN: But we've already heard that February is now delayed, I don't know what we heard, but I don't know how long.

MR. VANDERGRIFF: I don't know this for a fact, but it's probably because one or the other party has a conflict on that particular date that's been picked, perhaps even the ALJ has a conflict, and they're having to search for an alternative date. That's my speculation. The parties could tell us differently. But I think the intent at this point is to still hear those cases together, I don't think either party has disputed that, so that's the case.

MS. RYAN: Okay. So it's the decisions, separating the decisions.

MR. VANDERGRIFF: And that's not clear but there are two judges hearing the case which it's not even clear to the parties why that's occurring but my thought process is there are probably the two judges --

MS. RYAN: One is deciding one and one is 1 deciding the other. 2 3 MR. VANDERGRIFF: Right. MR. WALKER: They're both sitting on the same 4 stand? 5 6 MR. VANDERGRIFF: Well, they don't really sit like a judge, they sit like us. 7 MR. WALKER: I understand. 8 MS. JOHNSON: But it looks like they put them 9 10 together, at least if you look at page 4 of 8, to hear all of the testimony that they are hearing together for the 11 purpose of shortening the time period, I would think. But 12 13 they're two totally separate issues. MR. VANDERGRIFF: I think the SOAH judge is 14 15 acknowledging that, but I think they are -- they've said 16 this, for the purposes of efficiency, they've consolidated these two cases. There's similar witnesses, facts, 17 circumstances. It makes better economies of scale to hear 18 19 them together. MR. PALACIOS: Well, can we request for 20 clarification of the stay? And I'm not here to second 21 guess the SOAH judge, but I don't understand how you can 22 try both cases simultaneously. If termination is decided, 2.3 24 virtually for the dealer Star 4 is moot, it doesn't

matter. It just appears to me if you address one and then

the other or you have a procedure in place, again, for clarification of the stay that would allow to move forward on Star 6.

So I guess my question is: Is it within the rights of the rights of this board to request a clarification of the stay from the ALJ so that they can proceed?

MR. INGRAM: I guess you're trying to say, if I understand it, if we split them, send it back, we're asking the ALJ to look at Star 6 and see if there's merit to go ahead and lift the stay and proceed?

MR. PALACIOS: Yes. With Star 6.

MR. INGRAM: Right.

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MR. WALKER: Star 6 ultimately comes to us because we have jurisdiction, but we don't have jurisdiction in Star 4.

MS. RYAN: That seems to be the true thing up for debate, whether that was timing or process or should that have been allowed.

MR. WALKER: If DMV were actually in existence whenever Star 4 was filed, where would we be today had there not been a discrepancy as to who makes the decision under 4 and who makes it under 6? Wouldn't it be combined at that point in time and we would be the ultimate decision-maker then?

MR. VANDERGRIFF: Mr. Bray.

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MR. BRAY: I can only give you my speculation on where you would be. If you had been the final decision-maker in all cases at issue, and Mercedes-Benz had filed the termination, I would have expected Mr. Coffey to have raised with the ALJ the issue of the statutory stay. The ALJ would have made a decision in accordance with the rules, and it would have come before you then, the difference being you'd have both Star 4 and Star 6 to look at, not just Star 6.

MR. INGRAM: Is it possible to send it back, as Member Palacios mentioned, as far as splitting it and sending it back, asking whether they have enough information to clarify the Star 6 stay?

MR. BRAY: When you ay clarify the stay in Star 6, I'm not entirely sure what we're talking about because --

MR. PALACIOS: Star 4.

MR. BRAY: I'm sorry. I understood you to say Star 6.

MR. PALACIOS: No. It's clarification on the stay on Star 4.

MR. BRAY: I do not believe you have the right to tell the ALJ to clarify that, I believe that's the right of the parties, or maybe even Ms. Cost because it's

her case, however, you can ask or request.

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MS. RYAN: But we can make that request because 6 is in front of us. That one is affecting a decision on 6. Right?

MR. BRAY: Your control is over 6. If you believe that the stay in Star 4 needs to be discussed in a hearing, then you control 6 to see that happens. You make them stop 6 until what happens in Star 4 is what you want to see happen in Star 4 which is the process.

I would add one more thing because you know that I think the process was not followed here and that a step was skipped and that Star 4 is where the statutory stay should be addressed. I would like to point out kind of a new development because it occurred to me while we're sitting here. I don't believe either party or the ALJ or the staff have been clear before up to this point, or me. I think that what they're trying to say, what Mercedes-Benz is trying to say is that because there is a separate stay literally incorporated within the provision about termination that it's different from some of the other rights that are talked about in the Code, like models within a line. Under Star 4, Star is still entitled to all the models within the line, the capital requirements. Under Star 4, Star is entitled to have its capital situation as it exists right now, and a stay provides

that.

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I believe what Mercedes-Benz is saying and I guess the staff has said in the executive summary -- again, I just don't think anybody got this yet -- is that they're trying to say that you're not affecting a right of Star through the statutory stay in Star 4 because there is separate specific statutory language in a termination clause of our Code that would apply to Star 6. I think it's splitting hairs, but just so you're clear, that will be the basis if this goes up, when this goes up that a reviewing court will say any right, did you affect any right of Star in Star 4 by issuing the termination, and the argument will be no, because they have the right to file protest to the termination, that you did not affect any right.

MR. VANDERGRIFF: And the other argument, as I understood it from Star, is that you can't even file the termination or proceed on that termination unless and until the incentive case has been decided. I'm not saying that's right.

MR. BRAY: I disagree with that slightly. I would say you can't even file it until you get the stay lifted.

MR. VANDERGRIFF: Excuse me. You have to go to the court on the same Star 4 case to get the stay lifted.

MR. BRAY: I agree. My only problem is I believe what we are saying is the correct way that the process works. I cannot guarantee you that a court won't agree with the other side that you're not affecting the legal right because you have this separate stay within the termination clause of the statute. I don't know the answer to that.

MR. VANDERGRIFF: From what has been the

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MR. VANDERGRIFF: From what has been the precedent that's typically followed.

MR. BRAY: I don't think this has ever come up this way before, I'm not aware of it.

MR. VANDERGRIFF: So we're plowing new ground. Leave it to us.

MR. WALKER: So you're saying that there's two different stays involved here?

MR. BRAY: The first stay occurred in Star 4 when Star filed a complaint about the incentive case.

That stay is a general stay, it's in the Occupations Code under 2301.803 that says that at that point neither party, as the chairman pointed out, neither Star nor Mercedes—Benz can affect a right of the other party while the case is pending unless they get relief — in other words, somebody comes in and says I need to lift the stay.

The second stay occurs in Star 6 when Mercedes-Benz issued a termination notice to Star and Star filed

a -- first of all, there's language in there that says you 1 have the right to file a protest, and so that's what 2 3 Mercedes-Benz is saying: we didn't affect their rights, they still have the right. After Star filed the protest, 4 the stay that we just talked about is engaged in that case 5 6 as well. 7 MR. WALKER: The same terms of stay? 8 MR. BRAY: The same statutory language. MR. WALKER: So if you got the stay lifted in 9 4, there's still a stay in place in 6 because the Code 10 says that there is a stay under termination requests. 11 Correct? 12 13 MR. BRAY: Right, but the distinction is if you get the stay lifted in 4, it allows the termination 14 15 proceeding to move forward. 16 MR. WALKER: But then it still has its own stay 17 applied to it. MR. BRAY: Which means while they're arguing 18 19 about termination --MR. WALKER: They still ship them cars. 20 MR. BRAY: Yes, sir. 21 And then in that example, if the 22 MS. RYAN: stay in 6 were to take place and Star had a desire or felt 23 24 that there was a reason to file another suit, some other

behavior that wasn't appropriate with Mercedes-Benz, they

would have to come back and have the stay lifted in order to file a suit against the manufacturer in that scenario?

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MR. BRAY: I don't know. You'd think the answer would be yes, but I'm not so sure because these Code provisions are basically dealer rights, and I'm sure that Star will argue that they're free to exercise their rights under the Code to complain without lifting the stay. I don't know.

MS. RYAN: Complaining is different than filing a suit, though. Right?

MR. BRAY: I understand what you're saying is that what's good for the goose is good for the gander.

MS. RYAN: Well, that clarification would help, understanding that piece of it, at least in my mind, would help say was the process followed or not. If the answer was yes, then I would say the stay should have been lifted, it's both parties, it's to protect the rights. If we say no, then I maybe would have to go to the other side that said okay, well, the right to terminate was there and now your protest can be filed. That's what I'm trying to clarify.

MR. BRAY: But the difference is there is no Code provision that I'm aware of that says: Star, you can't terminate the agreement with Mercedes-Benz without giving them a right to protest, a notice and a right to

1	protest.
2	MS. RYAN: But filing a lawsuit would be
3	disruptive.
4	MR. BRAY: Affecting their right.
5	MS. RYAN: It could be disruptive. I don't
6	know the answer, I'm really asking.
7	MR. BUTLER: Mr. Bray, doe the staff still
8	stand behind their recommendations of what to do with this
9	case that's on page 7 of the executive summary?
10	MR. BRAY: I believe you'd have to ask staff
11	because I didn't write it.
12	MR. VANDERGRIFF: Ms. Cost.
13	MS. COST: Yes, staff still stands behind their
14	recommendation.
15	MR. VANDERGRIFF: Mr. Butler, are you preparing
16	to make a motion?
17	MR. BUTLER: I so move that we adopt the
18	staff's recommendation for this case.
19	MR. VANDERGRIFF: They have kind of a couple.
20	Are you saying on page 7, the Start request?
21	MR. BUTLER: The executive summary is in our
22	board book, page 7.
23	MR. VANDERGRIFF: Are you saying that your
24	motion is that Mercedes-Benz's actions in initiating
25	termination procedures against Star Motors are not in

violation of the statutory stay?

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MR. BUTLER: No. It says at number one we would decline to hear the appeal of the SOAH ALJ's interim rulings of the motions to abate, number two, we would decline to enter the requested cease and desist order because no cease and desist order has been issued by ALJ for the board consideration which would be appropriate under the applicable law, and number three, decline to hear or enter an order clarifying the automatic statutory stay because the final decision-make in Star is the Motor Vehicle Division director, and because the statutory stay in Star 4 does not prohibit or preclude Mercedes-Benz from filing a termination notice against Start Motors.

MR. VANDERGRIFF: All right. Do we have a second for that motion?

(No response.)

MR. VANDERGRIFF: I see no second for that motion, so that motion, as presented, will not move forward.

(General talking and laughter.)

MS. RYAN: Can we break them apart?

MR. BUTLER: How about a break?

MR. VANDERGRIFF: Mr. Bray, is it appropriate for us to take a short recess?

MR. BRAY: Yes, it absolutely is.

ON THE RECORD REPORTING (512) 450-0342

MR. VANDERGRIFF: Let's take a ten-minute break, or 15, and let's be back at 11:25 Let's say ten minutes.

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MR. BRAY: And I don't think I understood the gravity of your question. Of course, while you're on break you should not be discussing this matter.

MR. VANDERGRIFF: Exactly. But on that question I will note that we have a board member who is going to have to leave by preferably 11:30, no later than noon, so with that in mind.

MR. BUTLER: Let's wait.

MR. VANDERGRIFF: All right. Let's see if we can't come up with something.

I will note, by the way, that this process bothers me to a large degree is that we are deciding something of major gravity, and if we were a typical court, even a SOAH judge, we would take this under advisement and issue a ruling at a later date, so we are putting under the pressure and the gun of reading this stuff and hearing the arguments and making an immediate ruling which puts us under quite a microscope and the gun here which I'm personally not comfortable with, so I will note that.

MS. RYAN: Can we break it down? Part of me is very clear that declining any motion to abate the stay in

Star 4 is out of our jurisdiction and we should remove 1 that from kind of consideration. 3 MR. WALKER: I agree with Laura. MS. RYAN: We should take that off the plate, 4 if I'm hearing correctly. 5 6 MR. WALKER: That means you have to bifurcate because the cases are put together right now. 7 8 MS. RYAN: So lifting the stay or anything on 4, which is whether the stay should have been lifted or 9 10 not, isn't our decision to make. MR. VANDERGRIFF: But they didn't actually file 11 anything under 4. Star 6 was filed as an independent 12 13 matter. MS. RYAN: So then the next one is to request a 14 15 cease and desist order. To approve that would be 16 basically, because of 6, we have that right to consider that. Correct? 17 MR. BRAY: You have the right to consider. 18 not sure where a cease and desist order. 19 20 MS. RYAN: I'm reading the cease and desist order because nothing has been issued, but that's one of 21 22 the requests that's before us. So that's off the table. So within our scope to consider is do we request -- I'm 2.3 24 hearing we don't have the ability to require -- two

decisions. Whether they hear them together or not, we

need two decisions: one decision will go to the division director, one will come to us. And then do they hear them together?

MR. VANDERGRIFF: I will say, by the way, that -- pardon the interruption --

MS. RYAN: That's okay.

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MR. VANDERGRIFF: -- but just to make this point, I realize the law is the law, but it is somewhat absurd that we have this bifurcated situation, and that, frankly, if this ever comes up again, we should address it legislatively. The Motor Vehicle Division, as it was in TxDOT, is no longer the same. It had an entirely different structure, so a divisional director ruling, we really are the successor body of that divisional director, and frankly, should have the authority to rule on both. It puts us at a very difficult decision point here that causes some of this confusion. We don't, but it should.

MR. PALACIOS: Mr. Chairman, I have a question.

Can we call for an abatement of 6 while we seek

clarification on the stay for Star 4?

MR. BRAY: Yes and no. You can certainly call for the abatement of 6 and you can express why, what you want to see happen in Star 4, you just don't have control over Star 4.

MR. VANDERGRIFF: I think you can request it.

MR. PALACIOS: But we can request for 1 2 clarification of the stay, can we not? That's the step, 3 again, that I keep getting back to that was missed in this whole process. 4 MR. VANDERGRIFF: Well, me personally, again, 5 6 I'm speaking speculatively here so I cannot be certain of 7 this, but based on the way that the case has worked, it is 8 probably likely that had a motion to abate been filed in 4 in order to consider the termination, if that would have 9 been done, they would have been consolidated and we'd be 10 in the same spot we're in right at this point. But I have 11 no way of knowing that, we don't have a SOAH judge present 12 13 here, I was not participating in that. MR. WALKER: We're sure that in the law, in the 14 15 bill it doesn't say that any and all powers held by the executive director transfers to the board? 16 MR. BRAY: We're sure. 17 MR. WALKER: That should have been put in that 18 19 bill, but that's hindsight, I guess. MR. INGRAM: Chairman, do you have a solution? 20 MR. BRAY: I'm sorry. Did you say transfer to 21 the ED? 22 MR. WALKER: No. Transfer to the board. 2.3 24 MR. VANDERGRIFF: What I would prefer to do is to take this -- I realize the parties want a decision and 25

they need to move forward, but to take this case under 1 advisement and issue an opinion from the board at a later 2 3 date, which we have a meeting scheduled on January 4. I'm concerned that we're not going to reach a conclusion here 4 5 today. 6 MS. RYAN: Is it possible if we do that that the issues would be withdrawn and the parties would take 7 it back to SOAH? 8 MR. VANDERGRIFF: That's up to the parties. 9 10 MS. RYAN: Right, but that's an option. So we aren't tying them up if they choose not to be tied up, 11 delayed. They could wait and they could go another route. 12 13 MR. VANDERGRIFF: That's correct. MR. WALKER: I thought about that a while ago. 14 15 What if 4 is abandoned and the parties just re-file and then it all comes back to us and just delays it out a 16 17 longer path. Right? MR. VANDERGRIFF: Well, I don't know that the 18 19 parties would abandon 4, necessarily. MR. INGRAM: Theoretically, Mercedes would have 20 to go back and go to 4 and ask for lift of the stay. 21 22 Correct? MR. VANDERGRIFF: Correct. 2.3 24 MR. INGRAM: And then they would turn around and file for termination. 25

1	MR. VANDERGRIFF: Correct.
2	MR. WALKER: Then it goes to the ED, it doesn't
3	go to us.
4	MR. INGRAM: No. It goes to us.
5	MR. VANDERGRIFF: No oh, I'm sorry, yes it
6	would, it would go to us.
7	MR. WALKER: Under 4?
8	MR. BRAY: Not under 4, under 7.
9	(General talking and laughter.)
10	MR. VANDERGRIFF: I will let the audience know
11	that the look in Mr. Walker's eyes.
12	MR. WALKER: How did we get to 7? I didn't see
13	that.
14	MR. VANDERGRIFF: You didn't see that one
15	coming, huh?
16	MS. RYAN: I make a motion that we take it
17	under advisement, get additional information, and make
18	suggestion for conclusion in January.
19	MR. BUTLER: Second.
20	MS. JOHNSON: That's because you're not going
21	to be here.
22	MR. BUTLER: You just now figured that out?
23	MS. RYAN: Can we take it up in March of 2015?
24	MR. VANDERGRIFF: March of 2015. I won't be
25	here then either.

ON THE RECORD REPORTING (512) 450-0342

(General laughter.)

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MR. VANDERGRIFF: We have a motion and a second, but you do have a question.

MR. WALKER: I do have a question. How do we take it up because under the Open Meetings Act, anything we do has to be in an open meeting open to the public, so we're just going to be right back where we're at again in a public forum sitting here scratching our heads because we can't go behind the scenes back here and sit and say let's talk about this.

MS. RYAN: We can get staff to do additional research, though. Right?

MR. VANDERGRIFF: She's answering the question that I was going to ask Mr. Bray. That is true in terms of the deliberation of the issue, but in terms of requesting additional information, either from the parties on a specific question before us or from your office or the Motor Vehicle Division, we can ask those questions.

MR. BRAY: Yes.

MS. JOHNSON: But then why can't we ask the ALJ to clarify the stay then, because that's part of the problem.

MR. VANDERGRIFF: We could request that the ALJ do that. If you prefer to do that, we certainly could

ON THE RECORD REPORTING (512) 450-0342

request that.

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MS. JOHNSON: Well, I'm not sure we have all the pieces without that, do we? So I'm not sure if we still have enough information.

MS. RYAN: Can we make that request as part of our due diligence? Can staff make that request while we're taking it under advisement, to get information from the ALJ to help us better understand why they failed to say that it needed to be lifted?

MR. VANDERGRIFF: Well, that was not presented to them, remember, it was a separate action. There was no request to clarify the stay -- or lift it.

MS. RYAN: Can we ask basically why they felt the process didn't need to be followed, because based on their actions, they didn't.

MR. VANDERGRIFF: Right. They didn't bring that issue up, so you could infer that they perhaps considered it.

MS. RYAN: But if by clarifying the stay they would say: Yes, we considered it and here's why we did, or no, we didn't even consider it, we didn't know it was there. I don't know what they'll say. But then we would at least know where the decision was coming from.

MR. BRAY: In my mind, it would be better if that were officially the request of the board that you

express that in open meeting and we transmit. And the reason I say that is if it becomes a staff task, I get a little concerned that we're going to wind up becoming some kind of a party to their proceeding, and this is not an agency proceeding, this is where the agency is a forum.

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MR. VANDERGRIFF: Then perhaps this would work, maybe to request from SOAH that the statutory stay be broadly construed and to request from SOAH that the party, Mercedes-Benz, should have brought a motion to clarify the stay in Star 4 versus filing in Star 6. Would that be an appropriate request? I don't think we can order because Star 4 we have no jurisdiction, according to the staff.

MR. BRAY: I think that's right, and I think it's appropriate, but then that's kind of how I see it, yes.

MR. VANDERGRIFF: I understand. But would that get you to -- because the vice chair and Director Ryan have raised that question.

MR. INGRAM: So we're basically abating 6 and asking for clarification.

MR. VANDERGRIFF: No. At the moment we're asking for a statement regarding the statutory stay being broadly -- requesting a statement from them about the statutory stay and how it was construed, and in our case we're looking at it to be broadly, and to clarify the

statutory stay should have been brought in Star 4 versus a 1 filing in Star 6. You're inviting them to get to the same 2 3 place they're already in, but just to clarify that, frankly. 4 MR. PALACIOS: So does she need to change her 5 6 motion, because essentially all she asked for is more time. 7 MR. VANDERGRIFF: Yes. You'd have to withdraw 8 9 that motion, I think. We can also vote on that motion 10 too. MS. RYAN: Can I alter it to include additional 11 time and a request of the SOAH judge to broadly clarify 12 13 the stay -- is that the word you used, broadly clarify the stay? -- prior to our January meeting so that we would 14 15 have that information to take under advisement? 16 MR. VANDERGRIFF: To broadly construe. 17 MS. RYAN: Broadly construe. MR. VANDERGRIFF: Yes. 18 19 MR. BRAY: I think we can, I'm just unclear because I can't incorporate that with what the chairman 20 was saying. I got the chairman to be saying that you --21 MS. RYAN: I'll withdraw my motion and we can 22 2.3 start over. 24 MR. BRAY: That you dispose of this case by

sending your sentiments that they ought to do the things

he suggested. 1 MR. VANDERGRIFF: To broadly construe the 3 statutory stay and to request that Mercedes-Benz should have brought the motion to clarify the stay in Star 6. 4 MR. INGRAM: I like that motion. 5 6 MR. BUTLER: We'll you've already got one on the floor. 7 MS. JOHNSON: She withdrew hers if you withdraw 8 9 your second. MR. WALKER: I'm lost. 10 MS. RYAN: Does that ask for clarification, or 11 12 are we directing them to change the process? 13 MR. VANDERGRIFF: We're requesting, that's different than directing. The may tell us pound sand. 14 15 MS. RYAN: They may tell us we disagree and 16 here's why, or they may say we agree, we didn't see that 17 point, and we will adjust. MR. VANDERGRIFF: What I hope would come out of 18 19 it would be that they would give us clarification of their rationale for not having done this in the first place. 20 We're only asking for a request, because according to our 21 counsel, we have no jurisdiction in 4 so we can't make a 22 demand or an order on 4. 2.3 24 I am comfortable with -- this is a personal 25 issue -- I am comfortable with the cases proceeding in a

consolidated matter. I think justice delayed is justice denied, and from both Mercedes's perspective and the party's perspective, proceeding forward is a good thing, but I'm uncomfortable with the action of not having gone through and made sure that the cleanup clarifying that statutory stay and what it allowed them to do or not to do. I believe that should have taken place.

MR. PALACIOS: And Chairman, that gives me a lot of heartburn as well, and I'm just concerned if they come back, whatever answer, at that point we make a decision. We may or may not like their response but I'm uncomfortable as well. The process wasn't followed so going forward, I'm looking at precedent now going forward, are we going to be sitting here and trying these cases on an ongoing basis, having to second guess what SOAH judges do?

MR. WALKER: There is no precedent and it may never happen again.

MR. VANDERGRIFF: Maybe there's a third part to this is that this board contemplate and issue an opinion that we believe that, frankly, the statutory stay should have been clarified, that would have been the proper angle for this case to have proceeded, but we have no jurisdiction to order that in the 4 case.

MR. PALACIOS: I understand that. Given that

we have no jurisdiction on 4, we do have jurisdiction on 6, so if SOAH comes back with a response that maybe something we don't agree with, at that point I guess could we abate 6?

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MS. RYAN: You'd have to hear their reasoning.

MR. INGRAM: But Star still has the right to

protest on Star 6. Right?

MR. VANDERGRIFF: On the merits.

MR. INGRAM: On the merits.

MR. VANDERGRIFF: And from a personal perspective again, I do agree that the manufacturer can proceed on a termination independent — the statutory stay, in my opinion, is not so strictly construed that it would prevent a termination action from proceeding, because otherwise, that would be the first defense that any poor-performing dealer would throw up is put some action in place just before a termination proceeding so it couldn't go forward. I think a termination proceeding can go forward but it needs to be done in the proper context.

MR. PALACIOS: I agree.

MR. VANDERGRIFF: I would have no hesitation here if it wasn't for the fact that, based on the staff's indication, we have no jurisdiction in 4. But I'm also reluctant to just completely abate Star 6 and kill the process of going forward on a termination.

1	MR. BRAY: Well, one possibility, if you abate
2	Star 6, is in your order you make it clear that you're not
3	commenting on lifting the stay for termination to be
4	included in Star 4 which would allow it to go forward if
5	the ALJ chose to let it go forward.
6	MR. VANDERGRIFF: So you're saying abate 6
7	MR. BRAY: I'm saying that's a possibility.
8	MR. VANDERGRIFF: I understand what you're
9	saying. That's why I said abate 6 with a strong
10	indication to the ALJ that if they would just clarify the
11	stay, they might could go that direction.
12	MR. BRAY: That's right.
13	MR. VANDERGRIFF: And then we have no
14	jurisdiction over it.
15	MR. BRAY: That's right.
16	MR. WALKER: Or the termination. What happens
17	to the termination?
18	MR. BRAY: It becomes part of Star 4.
19	MR. WALKER: And then we have no say?
20	MR. BRAY: Well, actually, let me back up. I
21	think the ALJ would have the latitude, it could become
22	part of Star 4 by lifting the stay, or by lifting the stay
23	the ALJ could say you're good to go to either continue
24	with Star 6 or Star 7, whatever you want to call it.

MR. WALKER: That leaves us right where we are

today. 1 MR. BRAY: It leaves us where we're at today 3 except that Mercedes-Benz would have gone through the step of getting the stay lifted. And I believe that's what Mr. 4 Palacios is saying. 5 6 MR. INGRAM: That's kind of where I was trying to go is saying that we would abate 6 and let them go 7 8 through the process. MR. PALACIOS: Right. That's what I suggested 9 10 earlier. MR. VANDERGRIFF: And the issue that I have 11 with that, which is the issue that I have with these two 12 13 cases being split and our decision-making authority being split, is that then puts the manufacturer in the penalty 14 15 box, perhaps unduly. 16 MR. PALACIOS: But does it still provide them 17 the opportunity to have the stay lifted? MR. VANDERGRIFF: But effect does that have? 18 19 We've abated the case. MR. BRAY: If you abated 6, it doesn't affect 20 them going forward to ask about a lift in 4. 21 22 MR. INGRAM: Especially if we enter a comment or some sort of statement from the board. 2.3 24 MR. BRAY: Which is your motion -- which I

understood, and I need some clarification because we'll be

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1	drafting the order, but I understood your motion which
2	incorporated his comments, I didn't see feedback coming
3	from the ALJ, I understood your comments to be sending
4	MR. VANDERGRIFF: Right. I was not suggesting
5	to abate 6 but I was suggesting for strong instructions to
6	them or requests.
7	MR. BRAY: And then whatever happens out of
8	that doesn't come back to you until you see a PFD or some
9	other action.
10	MR. VANDERGRIFF: That's correct. Whereas, the
11	potential motion well, we have one to have to consider,
12	but the potential motion would be to abate 6 and do the
13	same thing, but with the added provision of abating 6.
14	I'm sure that's as clear as mud for everybody
15	on both ends of the table.
16	MR. BUTLER: Have you withdrawn your motion?
17	MS. RYAN: I did withdraw it.
18	MR. BUTLER: I withdraw the second also.
19	MR. VANDERGRIFF: All right. So are you now
20	going to make a motion, Mr. Ingram?
21	MR. INGRAM: I can, I'll try.
22	MR. VANDERGRIFF: If I can help, maybe.
23	MR. INGRAM: Well, go ahead.
24	MR. VANDERGRIFF: I think your motion is to
25	abate Star 6, so that part we're clear on, with a request

or instructions, perhaps, to the SOAH ALJs -- plural, I 1 2 believe there are two -- that the statutory stay should 3 have been broadly construed, in our opinion, but that Mercedes-Benz has the right and should have brought a 4 motion to clarify the stay in Star 4 versus filing in Star 5 6 6, and perhaps a further statement that we are in favor of judicial economy. 7 8 MR. WALKER: What is judicial economy? MR. VANDERGRIFF: That the consolidation of the 9 two cases for purposes of witnesses and time and all of 10 11 that is not a bad thing. 12 MR. PALACIOS: I agree with everything except 13 the second part. MR. VANDERGRIFF: The second part or the last 14 15 part? 16 MR. PALACIOS: The judicial economy. To me 17 that's irrelevant in this whole case. MR. VANDERGRIFF: Again, all three of the 18 19 recommendations or requests or instructions, however you want to say it, they can ignore those, they're irrelevant 20 to them based on our jurisdiction. 21 MR. WALKER: But judicial economy is what got 22 us where we're at. 2.3

ON THE RECORD REPORTING (512) 450-0342

factor in our decision. I think they should have been

MR. PALACIOS: But I don't agree that it's a

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bifurcated. 1 MR. VANDERGRIFF: Well, at this point it's Mr. 2 3 Ingram's motion, so if he includes it, then you can vote against it, or if he doesn't include it. I'm adding those 4 three things. You can reject all of those, it's your 5 6 motion. 7 MR. WALKER: Victor, why don't you make the motion? 8

MR. VANDERGRIFF: I'm the chair, I need one of

you to make that motion.

MR. WALKER: He can't make a motion?

MR. BRAY: He can but it's typically not done.

MR. INGRAM: I will make the motion, including the three phrases at the end that are requests, and the reason why I'm including the third one is it's just horribly inefficient.

MR. BRAY: Can I help?

MR. INGRAM: Yes.

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MR. BRAY: The third part makes sense. Let's just say the ALJ lifts the stay and allows termination to proceed, then the question is: Is termination proceeding as part of Star 4 or do we have a Star 7, and if you have your statement that judicial economy is preferred, they'll wrap it into Star 4.

MR. INGRAM: And that's the thing, I don't want

ON THE RECORD REPORTING (512) 450-0342

a Star 7, I really would prefer that Mercedes go in, go to 1 the ALJ, lift, if possible, the stay, and proceed with 2 their termination. 3 MR. PALACIOS: I agree. I just don't think 4 5 that the language at the end is necessary, I think it's 6 just de facto going to happen, but I'm fine with the motion. 7 MS. JOHNSON: So are you going to second it? 8 MR. PALACIOS: I'll second it. 9 MR. WALKER: And this will not delay Mercedes's 10 actions on a termination, it will just merely put them 11 into line with the Star 4 case? Is that what it's 12 13 basically doing? MR. VANDERGRIFF: Well, no. It could delay 14 15 them for a short period of time. I'm not trying to put 16 words in Mr. Ferguson's mouth, but they will, I'm sure, 17 move to clarify the stay, and they could object to our opinion, obviously, and appeal that as well, but I think 18 19 that's what they would do. MS. JOHNSON: But is not part of this motion 20 for instruction for the SOAH ALJ to clarify the stay? 21 That is part of this motion? 22 2.3 MR. VANDERGRIFF: To broadly construe. 24 MS. RYAN: But if we abate 6, you're broadly 25 construing, kind of.

MR. VANDERGRIFF: No. We're sending 1 2 instructions. We're saying that the statutory stay should 3 be broadly construed which is really the reason why we're abating 6, but that Mercedes-Benz could file a motion to 4 clarify the stay in Star 4 and basically proceed with the 5 6 termination action, and that we are in favor of judicial economy. So we're basically making sure it's really 7 8 clear, we're basically telegraphing that they didn't 9 follow the right process but the result is not necessarily a bad result to consolidate these two cases and move 10 forward to a speedy resolution. 11 MS. RYAN: But their feedback is not 12 13 necessarily important to us, the decision won't be made and we won't be taking it back up in January. Correct? 14

MR. VANDERGRIFF: Yes.

MR. INGRAM: And also, too, I think it would also send a signal that we're not saying that Star 4 has to be tried to its conclusion before a termination could proceed if the stay was lifted.

MR. VANDERGRIFF: That's correct.

Mr. Ferguson.

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MR. FERGUSON: Just one clarification. If you abate the case, I kind come from the opinion that I have to come back to the people who abated it to get it unabated, and so a question was just asked are we going to

be back here, which we will be.

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And for your answer, there is a Star 7 that was filed without seeking lift from any stay.

MR. COFFEY: I'm going to object to that. We did file a motion to lift the stay with the SOAH ALJ.

That is an absolute fabrication.

MR. FERGUSON: No, no. My point is this, it was filed and then they said we'd like to lift the stay.

MR. COFFEY: That's not true. We filed them contemporaneously, we made it clear to everyone that we are asking the SOAH ALJ if we can go forward with Star 7 by the SOAH ALJ lifting the stay. We followed the procedure that your staff outlined at the last meeting very carefully.

MR. FERGUSON: I think my point was this, if I heard the chair or someone earlier, it was that we were wrong because we should have gone and asked to clarify the stay or lift the stay before we sent the termination. My point is they filed simultaneously asking to lift the stay which is not the process that was discussed.

Let me help this along, maybe. I thought about this after last meeting but I didn't want to do something that was perceived as being cute. We can go back and ask for the judge in Star 4 to do things and we'll do that if that will alleviate the angst and get people out of here

1	that need to get out of here. I mean, it's my belief I
2	can ask in a motion to clarify, to clarify that it doesn't
3	apply to the termination matter, and alternatively, if it
4	does, that they lift the stay and allow the termination
5	matter to go forward as they have already allowed. And if
6	I hear what you're saying, we'll come back over here when
7	it's done and we go from there.
8	MR. WALKER: I think that's exactly what we
9	were trying to get to.
10	MR. VANDERGRIFF: We're getting way far
11	afield I appreciate it very much but where we should
12	be as the deciding body with this.
13	MR. INGRAM: To me, the motion on the floor is
14	saying kind of a similar thing, so I don't understand the
15	difference.
16	MR. VANDERGRIFF: The difference is he was
17	requesting we not abate the case, and that's different.
18	MS. JOHNSON: We have a motion on the floor.
19	MR. PALACIOS: A motion and a second.
20	MR. WALKER: Do we have the motion written down
21	somewhere?
22	MR. VANDERGRIFF: We've stated it a couple of
23	times.
24	MR. WALKER: No questions about what it is.
25	Okay.

MR. VANDERGRIFF: Well, I'm asking is there any further discussion or questions.

MR. BRAY: Hang on, please. Do you want to leave the SOAH ALJ with the most flexibility possible if they go through the steps the proper way?

MR. VANDERGRIFF: And so what are you suggesting?

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MR. BRAY: That if you want to send a message that you'd like the SOAH ALJ to consider the stay in 4.

MR. VANDERGRIFF: We've asked them to broadly construe the stay.

MR. BRAY: The stay in 4, and my question is if they go back and do that, do you want to leave the SOAH ALJ with the broadest discretion possible, whether it's Star 4, Star 6, Star 8, if they lift the stay, however they administer it seems appropriate, but I don't know if you intend that much flexibility. I'm trying to get you out of having to hear a motion to lift the abatement because if the SOAH ALJ does what you ask and goes back to Star 4 and considers whether or not to lift or clarify or whatever, they're doing what you asked.

MR. VANDERGRIFF: Well, as I understood the motion, we give them these requests and if Mercedes-Benz filed to lift -- and perhaps I'm incorrect in this -- my understanding would have been if Mercedes-Benz files to

1	lift the stay or clarify the stay and allowed the
2	termination proceeding in Star 6 to continue, as it's been
3	consolidated, then that, in effect, is our rationale for
4	abating the case and then our abatement would at that
5	point be moot.
6	MR. BRAY: And that's what I'm asking, because
7	we need to incorporate that concept into you order if
8	that's what you intend.
9	MR. VANDERGRIFF: I think it becomes moot, and
10	my intent was the parties would not be coming back here.
11	MR. BRAY: I don't think it becomes moot unless
12	we tell them it becomes moot because a board order is a
13	little higher level than an ALJ order, in my opinion. So
14	that's what I'm trying to just make sure that that's what
15	you intend is if they go through those hoops
16	MR. VANDERGRIFF: That's was my intent.
17	MR. INGRAM: That's my intention as well. I'm
18	trying to avoid a Star 7.
19	MR. BRAY: Too late
20	MR. WALKER: We've already got that.
21	MR. VANDERGRIFF: We didn't know there was a
22	Star 7.
23	MR. INGRAM: Trying to avoid a Star 8.
24	MR. VANDERGRIFF: Well, that was my intent and
25	that's what I thought the motion was.

1	MR. INGRAM: Can we add that verbiage then to
2	my motion.
3	MR. BRAY: Yes, sir.
4	MR. INGRAM: And Raymond, is that fine? You
5	seconded.
6	MR. PALACIOS: So we're giving the SOAH judge
7	the authority to lift the abatement, essentially?
8	MR. VANDERGRIFF: No. The abatement becomes
9	moot. If they have clarified the stay, decided that the
10	termination, as they previously decided can move forward,
11	and that moves forward. If they do that, then our
12	abatement motion would be moot.
13	MR. PALACIOS: Okay. It's just a procedural
14	thing.
15	MR. WALKER: And then the termination becomes a
16	part of 4?
17	MR. BRAY: The termination could be 4, it could
18	be 6 or it could be 8. That's how I'm interpreting the
19	motion.
20	MR. VANDERGRIFF: I would not worry about that
21	until it comes back to us one way or another. Your mind
22	could be blown at the number of possibilities there.
23	(General laughter.)
24	MR. INGRAM: They'll still have the right to
25	protest.

1	MR. WALKER: Not to us.
2	MR. BRAY: That is an issue.
3	MR. WALKER: They can't protest to us.
4	MR. INGRAM: That's true if it goes back to 4,
5	but let's don't talk about that, let's just move on.
6	MR. PALACIOS: I just wanted to comment. I
7	guess the question I have, we don't have the authority
8	either way to agree or disagree if a SOAH judge does
9	comply and lifts or doesn't lift the stay.
10	MR. VANDERGRIFF: If the SOAH judge doesn't do
11	those things, then we have a motion to abate and we have
12	abated, so we would be in direct conflict.
13	MR. PALACIOS: If he chooses not to lift the
14	stay, what happens?
15	MR. VANDERGRIFF: It will be coming back to us.
16	MR. BRAY: I might suggest that I thought the
17	point was that he consider the stay.
18	MR. VANDERGRIFF: That's correct.
19	MR. BRAY: Whether he chooses to lift or not.
20	MR. VANDERGRIFF: But if he doesn't, then our
21	abatement is not we've given them whether it's
22	instructions or requests or whatever, we've given them a
23	laundry list of three items, four items.
24	MR. BRAY: Yes, sir, but what I thought your
25	language was was that they should have broadly construed

and considered the stay. 1 MR. VANDERGRIFF: That's correct. 2 3 MR. BRAY: So if someone goes back to them and tries to lift the stay and the ALJ does not lift the stay, 4 they've considered it. 5 6 MR. VANDERGRIFF: But wouldn't that then come back to us? They've considered it but our abatement is 7 still in effect. The reasons for our abatement have not 8 been eliminated, so our abatement is still in effect. 9 10 MR. BRAY: I thought the reasons for your abatement had been eliminated which was that they took it 11 up, not what they did with it. 12 13 MR. WALKER: Let me ask you a question. You keep saying they but doesn't it go to the SOAH judge. 14 15 MR. VANDERGRIFF: There's two of them. MR. WALKER: I understand, but one is assigned 16 17 to 4 and the other one was assigned to 6. By sending it back to 4, it would go to both, they would both make the 18 19 decision? 20 MR. VANDERGRIFF: Now you're scaring me, you're starting to understand all these things and how they're 21 moving, and that's scaring me a bit. But yes, you may be 22 right, it should be a singular perhaps. 2.3 24 MR. WALKER: Well, I mean, if you're sending it back to 4, 4 made the decision on 4, why would the person 25

in 6 --

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MR. VANDERGRIFF: Well, we can't send it back to 4, we don't have the jurisdiction over 4, according to staff.

MR. INGRAM: Is it clear to say that even if we abate 6, 6 still exists. Right? And so then the dealer still has the right to protest. I don't fully understand if we do say we're going to abate 6, what is the outcome of that, if you can clarify that.

MS. COST: For the record, Molly Cost, director of the Motor Vehicle Division.

If you abate 6, basically the proceedings just stop. They don't go away, they just need to be stopped.

That's what an abatement is, just stopping something.

The issue with two ALJs or one ALJ, I don't know, the parties could probably answer that question better, but what I have seen SOAH do in the past is they actually have two ALJs sit and hear a case and they both participate and write the PFD.

MR. VANDERGRIFF: And if something happens to one, then they've got a backup.

MS. COST: Right.

MR. VANDERGRIFF: I'm going to note that we have maybe a couple of other things that we need to take up business-wise, and we're either going to need to move

1	on this with an opinion or we're going to table it to the
2	next meeting.
3	MR. PALACIOS: I think we should move forward
4	with this.
5	MR. WALKER: We have a motion.
6	MR. VANDERGRIFF: I understand, but I'm saying
7	we're going to lose a board member in a decision here if
8	we don't move forward.
9	MS. JOHNSON: We might end up in a tie.
10	MR. PALACIOS: Let's vote on his motion.
11	MR. WALKER: Call for a vote.
12	MR. VANDERGRIFF: We have a motion from
13	Director Ingram and a second from Director Palacios. All
14	those in favor please raise your right hand in support of
15	the motion.
16	(A show of hands.)
17	MR. VANDERGRIFF: All those opposed.
18	(A show of hands.)
19	MR. VANDERGRIFF: The motion carries six to
20	one, with Director Ryan voting against it.
21	I'm going to skip to the next item, with
22	everybody's indulgence, on to 4.B, and that's the
23	consideration of the election of the vice chair.
24	At our last board meeting we discussed having
25	an election. We previously had a rule that we were going

ON THE RECORD REPORTING (512) 450-0342

1	to elect in May and because of the lack of a meeting in
2	May and the untimely death of Mr. Gillman, we did not hold
3	that meeting, and so we discussed and decided to now have
4	it in December on an annualized basis, and so we have come
5	to that point.
6	The vice chair was not here at that particular
7	meeting, so she may have comments to ask or clarification.
8	MS. JOHNSON: No. I'd like to make a motion.
9	MR. VANDERGRIFF: Okay.
10	MS. JOHNSON: And I actually have two motions,
11	but I'm going to take the first one but I would like you
12	not to adjourn or run out the door until we get to the
13	second one, please.
14	My first motion is going to be nominate Laura
15	Ryan as vice chair beginning with January 1, 2012. Do I
16	have a second?
17	MR. INGRAM: Second.
18	MR. VANDERGRIFF: Are there any further
19	nominations?
20	(No response.)
21	MR. VANDERGRIFF: Seeing none, the nomination
22	is closed, and all those in favor of Ms. Ryan as the vice
23	chair, please raise your right hand.
24	(A show of hands.)

ON THE RECORD REPORTING (512) 450-0342

MR. VANDERGRIFF: The motion carries

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unanimously.

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(General talking and laughter.)

establish a two-year term for the position of vice chair, and before I get a second, I would like to say that the purpose of that is continuity. If Board Member Ryan takes over as vice chair, which she will January 1, that position needs to continue through the startup of the legislative session, and I think that this board would be well served. The chairman is very busy during the session, and it would allow her in then in 2013 to take over any meetings that we might need in his absence. And it takes a while, and you're on top of things, but in any instance it would take a little bit of time for a vice chair to get on board, understand fully what's going on, and then be able to be very effective in the second year.

So I would move to establish a two-year term for the position of vice chair.

MR. INGRAM: I have one comment. While I'm not opposed to it at all, my comment is that we are missing several board members.

MS. JOHNSON: We're missing two.

MR. WALKER: Well, okay, then I'd like to make another comment if we're going to do that before we second the motion. My comment is that we, and with all due

respect to you, Cheryl, we were all here last month, and 1 we made a decision last month to do this on an annual 3 basis, and are we going to change this every single month as we go forward that we change the way we're going to 4 appoint the vice chair. 5 6 MS. JOHNSON: I was not here, but had I been here --7 8 MR. WALKER: There was a motion last month, and 9 it passed unanimously, that we would annually elect a vice chairman every single year in the December board meeting. 10 MS. RYAN: It could be repetitive, though. 11 Right? 12 13 MR. WALKER: It could be repetitive. MS. RYAN: Voted back in for that second year, 14 15 and to your point, there might be reason for continuity. 16 MR. WALKER: Nothing says we have to change who 17 the chair is, it's just that we have the opportunity to do it on an annual basis every year in December. And for my 18 two cents worth, I think we made a decision last month as 19 a board and everybody was here but you. 20 MS. JOHNSON: I'm looking at the interest of 21 continuity. I do believe during a session it's going to 22 be very hectic. If the effect is going to be the same if 2.3 24 we reelect the same person in December, I'm just concerned

about the continuity in the future.

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1	MR. VANDERGRIFF: Is there a second for the
2	motion?
3	MS. JOHNSON: No. The motion fails.
4	MR. INGRAM: Your point is well taken, though,
5	Cheryl.
6	MR. VANDERGRIFF: What I'd like to suggest
7	we do have one more matter that will require comments from
8	the public that are interested in it, that's item 4.A, and
9	then we do have the various briefing items is let's
10	take a ten-minute break and convene here again at noon.
11	And with that, I will note that Board Member Ryan will be
12	leaving.
13	(Whereupon, a brief recess was taken.)
14	MR. VANDERGRIFF: We are now back in session.
15	It is approximately noon.
16	And the item on our agenda is 4.A, which is the
17	consideration of a formal opinion request from TADA
18	concerning factory website marketing program incentive
19	payments. Ms. Cost.
20	MS. COST: For the record, my name is Molly
21	Cost, and I'm the director of the Motor Vehicle Division.
22	The matter before you for your consideration is
23	a request by the Texas Automobile Dealers Association,
24	TADA, for a formal opinion from the board that the
25	requirements of a particular manufacturer's website

marketing program do not comply with the law. TADA believes that the website marketing requirements are discriminatory or unreasonable and therefore, do not comply with the Occupations Code Sections 2301.467(a) and 2301.468.

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This is the first formal opinion request that's going to go through the departments new comment process.

Comments were received from three stakeholders: David

Coffey, Buddy Ferguson on behalf of BMW of North America,
and David Bright on behalf of the Alliance of Automobile

Manufacturers.

Mr. Coffey stated that these types of incentive programs typically violate the Occupations Code because the manufacturer is able to control a dealership's operations where operational objectives are tied to margin manipulation.

BMW North America asserted that its website incentive program that concern sales quotas, does not require dealers to purchase special tools or equipment, does not measure a dealer's performance using formula or process, does not result in unfair selling of vehicles from BMW North America to its franchise dealers, and the standards are not unreasonable and do not treat dealers differently, unfairly or inequitably. BMW North America also argued that the board's findings of reasonable,

different or inequitable treatment requires comparison of two or more situations which cannot be done in a formal opinion forum without extensive investigation, research and collateral inquiry

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The Alliance argued that TADA's request created specific case-by-case questions of fact that cannot be answered without additional research and collateral inquiry to determine whether TADA's descriptions of the website incentive program, website standards and incentive or bonus mechanisms are accurate. The Alliance argued that TADA's request encroaches on SOAH's fact-finding role and shifts the burden of persuasion from the parties to show a violation has been made to the manufacturer, to show the absence of a violation.

The issue ultimately presented for the board's consideration is whether TADA's request for formal opinion is appropriate given the parameters of the board's rule regarding formal opinions, 43 TAC, Section 215.4, and if it is appropriate, are the manufacturer and distributor incentives regarding website requirements described in TADA's request discriminatory or unreasonable under the Occupations Code. Given the requirements of the formal opinion rule, staff concludes that the website incentive program issues presented in TADA's request are not appropriate for board consideration as a formal opinion.

The rule expressly states that a request is inappropriate for formal opinion where an informed opinion can be given only after extensive investigation, research or collateral inquiry. One reason for the provision is that such matters should be addressed in the complaint and contested case process where all of the issues can be fully vetted by the parties involved. The rule also expressly requires the request to include full and complete information on the matter. The formal opinion request is inappropriate for this decision because the board cannot determine whether full and complete information is within its possession to then be able to formulate an opinion applicable to this website incentive program.

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The request is insufficient to allow the board to issue a formal opinion conclusively agreeing or disagreeing that the web incentive program requirements are definitely unreasonable or discriminatory, therefore, staff recommends that the board decline to consider the request because the complaint or contested case setting, rather than the formal opinion process, is the more appropriate venue for discerning whether this program violates the state, is unreasonable or it's discriminatory.

I'm available for any questions.

ON THE RECORD REPORTING (512) 450-0342

1	MR. VANDERGRIFF: Did you read the full
2	applicable language in 215.4(a) to this?
3	MS. COST: Can I read it or did I read it?
4	MR. VANDERGRIFF: Did you read it.
5	MS. COST: I did at the time. I'm sorry, I'm
6	just rereading it to make sure. Yes.
7	MR. VANDERGRIFF: Okay. Just wanted to be
8	sure.
9	We do have a couple of people who wish to speak
10	on the matter for and against it. Does anybody have any
11	questions of Ms. Cost?
12	(No response.)
13	MR. VANDERGRIFF: I have one. If this is not a
14	matter that's appropriate, can you give us, not with a
15	specific but what rises to the level of where an
16	appropriate opinion should be rendered or could be.
17	MS. COST: Not to be cute, what the broadness
18	of statutory stay, that could certainly come to this board
19	for a formal opinion, does 2301.803 require either party
20	to a dispute to request to have a statutory stay lifted,
21	clarified or vacated before they can move forward on any
22	matter.
23	MR. VANDERGRIFF: Because that doesn't require
24	us to do any extensive investigation.
25	MS. COST: That's right. It's not a particular

ON THE RECORD REPORTING (512) 450-0342

fact situation, it's an interpretation of the statute and how the statute applies broadly.

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MR. VANDERGRIFF: And obviously stick around, we may have you back up, but we do have two people who wish to speak. Speaking for us issuing a formal opinion is Karen Phillips from TADA.

MS. PHILLIPS: Thank you very much. My name is Karen Phillips and I'm here on behalf of the Texas Automobile Dealers Association. And as has been pointed out by both Mr. Ferguson, as well as by the Alliance, the internet is a very important tool today, and it's a tool that all dealers, franchise dealers specifically, have to be on in order to be competitive in today's environment. And as Mr. Ferguson did point out, J.D. Powers has done a study on this issue and J.D. Powers did find that at least 80percent of the people who are out there purchasing automobiles are looking at the internet.

In addition to that, other studies have been done. One study indicated that 90 percent of all buyers research their purchases online and 80 percent use a search engine. Another study was done just of women, and that particular study stated that manufacturers' websites ranked dead last with respect to the influence of what a woman's buying decision is. It didn't really say where a dealer's was with respect to a woman, but we all know that

women have an influence on a majority of purchases that are made today with respect to automobiles.

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I wouldn't be here today if an incentive program and advertising were not key and very important to my members' business, and I wouldn't ask the board for an opinion if I felt that it needed discovery or investigation. There is frustration out there in my industry with the process because it's a timely and very costly process to file a complaint, and I think that we heard and you saw exhibited how that has come to fruition in the prior case that was just before you. Laws are passed but at great expense do we ever receive an opinion.

And unfortunately, dealers' margins are very thin today. Dealers' margins, on the average, according to TADA's information, are running about 1.16 percent of their pricing of cars, some dealers maybe 1 to 2 percent. That means that when the factory has an incentive program, that incentive program can mean a lot to that particular dealer, it can make or break a dealer. And unfortunately, the dealers are having to rely upon these incentive programs more and more in order to remain in business.

The factory controls the margin and then when a factory's incentive program is 5 percent of the base MSRP, or stated another way, 20 percent of 5 percent which

equals 1 percent, or \$400 of a \$40,000 automobile, or if I get paid \$150 per new vehicle sold if I'm compliant with the factory's website standards, then the franchisee has to take those.

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each and every element that was outlined in my request for proposal. The reason for that is because factory incentive programs are changing so rapidly, my initial request is no longer valid. That particular program has been morphed and changed by the particular factory that put it together. That's what happens. By the time a dealer would ask for and file a complaint, go through the hearing process, obtain a final decision, come to you with respect to an order, that program has gone away, it's no longer valid, the issue is moot. That result is that nothing really gets accomplished for the industry, it doesn't get accomplished for the dealer or the public or for the manufacturer or distributor, for that matter.

So because of the rapidity of these changing programs, I'm here today because I need guidance for my members. It's of no consequence as to whose program was described with respect to the request that I postured to you. I'm not here to single out any particular manufacturer or distributor, which is why no one is particularly identified. I'm asking for guidance,

guidance today from this board that you have the ability to give to the industry. My request is broader than just an opinion that would be going for just one particular program. We're asking for a broad and breadth of guidance.

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Now, you might initially state that the factory paying money to its franchisees is an incentive, is a carrot, and it's not a stick. You might also believe that the factory's money is the factory's money and they can do with it as they choose. You might also believe that the factory has the right to demand certain standards of its franchisees. I will agree with you that a carrot is always more persuasive than a stick. However, the incentive money here can result in the motor vehicle and the motor vehicle sales price between one dealer and another to be lower because of that differential in the incentive money when it is based on the MSRP as an incentive line.

The ripple effect and the compounding effect to the public cannot be denied. That particular dealer, if he loses a sale, loses his gross in trade, he loses F&I income, he loses repair work, but what is becoming so important to my members is they're losing their credibility. Because if that particular dealer does not get the benefit of the incentive money, he doesn't get to

sell the vehicle for that lower price that perhaps the dealer down the road does, and then he loses credibility with not only his buying public but with his friends and with anyone else that comes into the door.

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You might also say that the factory's money is the factory's money and they can do with it what they want, bu that has to be tempered with the law that is in effect and it has to be tempered with the fact and including what is in the best interest of the state's sound distribution of motor vehicles which is the general purpose clause that you find in 2301.001. The factory can demand standards, and yes, they can do that, but those standards have to be reasonable as set out in both 2301.468 and .467. That's what the law requires, that these standards be reasonable.

Factory incentive programs do change, and that's why I'm here asking for a breadth in guidance.

Whether all franchisees of a manufacturer are compliant with a program or not does not make the program reasonable, fair, equitable or lawful. Those are the standards that the factory has to comply with under Chapter 2301. There is no need for a deep, fact-intensive inquiry here, there's no need for discovery, the facts stand on themselves. To ask this board not to issue or render any type of discussion or guidance or opinion with

respect to incentive programs is a ruse to require dealers to file complaints and not obtain guidance from this board.

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The board can rely on the plain meaning of the text of the statute. The Texas Government Code makes that very plain, specifically says in 311.011(a): Words or phrases shall be read in context and construed according to the rules of grammar and common usage. That particular verbiage has also been cited in many, many cases. But the plain meaning of the statute and the words that the legislature used in .467 and .468, which are at issue here, are fairness, reasonable and equitable. doesn't require discovery to determine whether or not a particular program or an aspect of a program is reasonable, fair or equitable. I believe you can go to Webster's Dictionary, Black's Law Dictionary, and find very good definitions. Those definitions do require that something be just, good judgment, rational and rightful for the parties. Once again, two-tier pricing does not ensure a sound system of distribution of motor vehicles in this state.

What I've done today, in order to try to encapsulate and bring together an aspect of guidance, is I've prepared for you a proposed formal opinion, and I'm going to pass that out and ask that you consider it. This

proposal is not far from what the statute says. It's not also asking you to have an opinion with respect to a particular program that was at issue in my initial request. Once again, these programs change so quickly and so rapidly that any time one particular program would be either the subject of a request or a complaint will be moot by the time it ever gets litigated, and it will be able to not have any precedential value going forward.

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I'm asking that you consider the language which basically sets out the two statutory provisions, and I'm more than happy to answer any questions that you might have.

MR. INGRAM: I just need a minute to read it.

MR. WALKER: I have two questions for you,

Karen. I guess this is not a part of what your original

letter was that you sent out to us? I mean, this is the

first we've seen this here?

MS. PHILLIPS: I drafted this up last night because it had come to my attention that changes had occurred with respect to the initial proposal that I proffered, and even if you were to make a decision on what was initially proffered, it's out of date, it's totally out of date.

MR. WALKER: And that was going to be my second question to you is how do we make a determination here

because you started off in the beginning saying that:
Well, the example I gave you is no longer applicable
because things changed. Well, how do we give a formal
opinion because tomorrow things are going to change again,
and how is our formal opinion going to apply to something
that changes tomorrow? I'm on your side, really, to be
honest with you, on a certain amount of this, but we have
a formal mechanism in place today through the department
that says if there's an issue that there's a system to go
through an administrative law judge and make
determinations.

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Now, as a business person, and as a citizen, you want to know that, hey, what are the guidelines and what are the rules how we need to play the game, and let's don't wait to get our hands slapped and go spend a lot of money in a court of law, let's just work it out amicably, here's what we know the realms of what we do are supposed to be. So I agree with you that we need to maybe sometimes to issue some opinions, but by the same token, I don't know how you're going to issue a formal opinion when the landscape is changing so rapidly on this particular item.

MS. PHILLIPS: And you have succinctly stated the dilemma which is why when I wrote up this proposal -- and I could appreciate the fact that you would want to

take it under advisement, that you might want to think about it until another meeting.

MR. WALKER: I don't want to make a determination on something I just now saw.

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MS. PHILLIPS: Absolutely.

MR. VANDERGRIFF: I'm going to interject real quickly. In a typical proceeding, oftentimes the parties will present a proposed order, different sides of an issue would present that, in this case it's a proposed formal opinion, so we literally would take this under advisement, we wouldn't sign off on this today since we just got it. But that's common.

MS. PHILLIPS: And what I've done is I've tried to make this particular proposal broad enough to give guidance but not so specific that it will not be used for guidance in the future for both manufacturers, distributors and dealers. That's what I attempted to do.

I've also read numerous other website and advertising programs, and I can appreciate that all of these may change tomorrow but there are some commonalities with respect to some of these programs, and some of them are perfectly reasonable, some of the requirements are very reasonable, and I wouldn't ask you to consider anything that I thought was reasonable to be in violation of the statute.

One thing that if you'll notice in 11, which is common to at least four of these programs today, and that is that if the dealer is not compliant, then the factory has the ability to take that particular dealer off the URL or the factory website. I think we could all concur today and agree that if I'm a franchisee, I should be linked on that factory website and I shouldn't ever be taken off the link as long as I'm a franchise dealer.

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MR. WALKER: But when I read this packet last night, there's no evidence whatsoever that states that that has ever happened or would ever happen, that was just allegations that they were not --

MS. PHILLIPS: No, it's not an allegation.

MR. WALKER: Well, they weren't factual.

MS. PHILLIPS: It is part of a program. I can read to you the different factories where it is a part of their particular program, and if it never happens and you say in your proposal that that is unreasonable, inequitable and unfair, then it is guidance to both factories and dealers that it won't happen. This is only guidance, you have to understand, this is not a cause of action that's been filed. I am asking, on behalf of the members, to get some direction from this board as to when we do have an incentive program that is not fair, equitable or reasonable in a very general proposition.

Because I do recognize that these programs change so often and so much that we -- I think we perhaps had one case -- Brett, Molly, correct me if I'm wrong here -- the Nissan case which was litigated many years ago on an incentive program, and by the time it was litigated, that incentive program was gone and now we really have no precedent. So why should we have to keep going through this over and over again without having any direction and without obtaining any information to go forward with incentive programs, which is what we need.

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MR. INGRAM: Just on a quick read, Karen, I mean, I hear what you're saying about the speed and the difficult nature, and I understand that this is only direction, if you will. What is it that you hope to accomplish? I mean, ultimately, if someone does set up some sort of incentive program, it's still an interpretation, even what you've written, of whether it's going to fall into this or not.

MS. PHILLIPS: Well, because I have not listed any specific fact or any specific aspect, other than the URL linkage, it's general other than that, I think that it will be guidance to the industry.

And as far as what value does it give, it gives a lot of value, because this way, when a dealer believes that the incentive program may not be compliant, then we

have some guidance here as to what we are to be looking for for compliance purposes.

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MR. INGRAM: So you're trying to expand the words reasonable, fair and equitable to something more broad, that's basically what you're shooting for.

MS. PHILLIPS: I think that if you even just take Webster's definition of fair, equitable and reasonable, I'm happy with you using those. I don't think that we lose our common sense when we walk in the door. I think the plain language of those words are easy for us to understand, and I think we grow up with that. We know that when something is occurring and you look at it, you can, I think, have an idea as to whether or not you think it's fair and equitable and reasonable.

MR. INGRAM: So if you think the three words are great as they are, why are looking at these? I mean, I guess I'm struggling with how this is going to help.

MS. PHILLIPS: I think it will help because, for example, if we have a program or an aspect of a program that doesn't do what you think it should, i.e., if I get taken off of a factory's website, their URL, why should I have to go and litigate that. I think common sense says that that, in and of itself, is not a fair, equitable or reasonable aspect of a program.

MR. INGRAM: And so that one particular example

of the URL, I can kind of see that one particular one, but everything else, you kind of go back to well, is that reasonable, is that fair or is that equitable, and it's one person's opinion over here, another person's over here. I don't know. I get the URL point because it's a very specific point.

MR. BRAY: Number 11?

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MS. PHILLIPS: Yes, that's number 11. Number 12 has to do with two-tier pricing. I think that two-tier pricing, when you have an incentive program, I think that that, in and of itself, is not in compliance.

MR. INGRAM: I marked 12 as well.

MS. PHILLIPS: With Chapter 2301. I had to build the building blocks and lay out the statute.

 $$\operatorname{MR}.$$ INGRAM: I read all the building blocks and I got to 11 and 12.

MS. PHILLIPS: That's right. And number 13 is the final one, that if a program involves instructions that the factory has to balance those instructions and requirements with the dealer's or the franchisee's need for their own particular advertising and to allow for their own promotion. In other words, what we are seeing is we're seeing these standards becoming so arduous and so fact-specific that the dealer doesn't have much of the individualization on his own advertising.

And it's not just website, it has to do with all advertising, it's just that the website is where the focus seems to be because we have pixel size, we have issues with respect to coloration, the background color has to be a specific color. Well, if I use snow white instead of manufacturer white, then I'm not compliant. Well, I think that you would say that's not fair, equitable or reasonable.

MR. INGRAM: I get it. I think 1 through 10 is reasonable, fair and equitable, and 11, 12 and 13 is more to the specifics.

MS. PHILLIPS: Yes. And with any proposal, you wan to have the building blocks behind it in order to get to the heart of the matter.

MR. INGRAM: Okay.

MR. WALKER: Knowing enough dealers and manufacturers that I've run across in my life now --

MR. INGRAM: You say that in a bad way.

MR. WALKER: Well, I married a car dealer's daughter. Don't they have dealer councils where car dealers and manufacturers sit down and amicably work out, say: Hey, guys, we'd like to put this together, this is how the program is going to work, that says these are the auspices of what we think you ought to do, give us your input as a car dealer and as a manufacturer? Number one.

1	But number two is let's just assume that we
2	adopted this formal opinion, what am I supposed to do with
3	this? Do we have a file we put it in? Because we have a
4	mechanism, really, that Mr. Coffey is holding over there
5	which is a green book that says the rules, and the rules
6	basically say how the game is played and correct me,
7	Brett, if I'm wrong the law says this is what you're
8	going to do, and then the rules say this is how you're
9	going to do what we tell you you're supposed to do. And
10	so the rules basically apply instead of formal opinions,
11	do they not?
12	MR. BRAY: No. Both apply. The rules are the
13	rules and the formal opinions are the formal opinions.
14	MR. WALKER: Where do you publish a formal
15	opinion?
16	MR. BRAY: I don't know that
17	MR. WALKER: Where do you notify the public of
18	a formal opinion?
19	MS. JOHNSON: The AG does on its website.
20	MR. WALKER: The AG does, but where we do we do
21	that?
22	MR. BRAY: There's no reason why we couldn't
23	publish or shouldn't publish.
24	MS. PHILLIPS: I think one formal opinion has
25	been issued in my 26 years here.

MR. WALKER: From this agency.

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MS. PHILLIPS: From this agency, and it was last year with respect to the Ford Motor Company and the fact that they were not allowing dealers to opt for money to pay to them versus their sales money.

It's another tool for the industry to have and to use. It's also a method for you to give guidance to the industry as well as to potentially any complaint or cause of action that's filed, your guidance via your formal opinion would be used as information going forward to whoever that decision-maker is, whether it's judge, jury or whomever.

MR. PALACIOS: Ms. Phillips, could I ask you on number 13 what are we specifically asking for here? Are we concerned about restrictions that manufacturers put on dealers for reimbursement, or is it regarding co-op, or what?

MS. PHILLIPS: Number 13 is trying to get to the fact that the advertising programs have become so detailed that the dealer really has little ability to craft their own advertising in the way that they see fit with respect to their particular market, and this allows a statement from the board to say: Yes, factory, you have the right to have standards but you have to balance those standards with the needs of your dealer. It's trying to

say that some of these programs, without getting specific, have to be balanced. Like the pixel size, like the color of the background that have become so detailed that I might lose money if I don't comply with that specific requirement in the standards.

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So without having to be detailed and without asking this board to go through and look at any particular aspect of a program, I'm asking you generally to say if you have standards, you've got to balance those standards between the good of you as well as the dealer.

MR. PALACIOS: I just see this opening a huge can of worms. What is balanced to you or I may not be. I mean, are we talking pixels or are we talking the size of the ad, the ratio of new cars to used cars and so forth. I mean, to me that's all about balancing the needs of a dealer. I just think it's opening up a big can of worms for us.

MS. PHILLIPS: The can of worms is there, and I'm trying to get some ability of a dealer to say we have a right to have a balanced approach here, maybe this isn't reasonable. And maybe it can be used as a tool for negotiation, which is what we always hope is going to occur. We want things to be resolved before they ever get to a SOAH issue, before they ever get to a filed complaint, and if a dealer has the ability to say the

board has said, Yes, you have the right, factory, to have standards, but you also have to balance them with my rights too.

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I mean, maybe I'm in Bryan-College Station and I want to use maroon for my background color but I'm going to lose \$400 on a \$40,000 car if I use maroon on my background color. Now, that, to me, is something that the dealer can say there's got to be a balanced approach here for you having standards and for me being able to advertise for my locale in the best way that I need to advertise. Because let's face it, it's the dealer whose money is paying for the website, they're paying for the click charge, they're paying for the bandwidth, they're paying for the people to oversee their website, and when talking with some of the dealers, it can range up to \$500,000 for them to oversee their website, click charges can range up to over \$2 a click, depending upon what's negotiated. So these are not insignificant costs, and it is not insignificant for the dealer to be able to say, Okay, let's look at what you're asking and let's look at what my needs are and what I'm expending.

And it may seem generic and you may think that it won't be useful, but I guarantee you it will be helpful for a dealer to be able to say, Here's this formal opinion from the board, you have to look at what my needs and what

my requirements are and I'll look at what your needs and requirements are. It can be useful, I quarantee it.

MR. VANDERGRIFF: Any questions at this point?

MR. BRAY: May I ask a question?

MR. VANDERGRIFF: Sure.

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MR. BRAY: When I look at 11 and 12 and 13, I see those as things the board could easily transmit as a message to the state if they believe that. I'm looking at 4 through 10, and at first blush those look like kind of obvious restatements of the statute to me, and Mr. Walker might even say 1 and 2 also, and I'm trying to figure out what the board contributes by making those statements. Is it by saying these statements that you're saying marketing programs and incentive programs are service standards and/or standards or guidelines?

MS. PHILLIPS: I would say that marketing standards and incentive programs, number one, marketing standards, it's a sales program and it comes under .467(a)(1). I'm not asking, nor, even though it's been alleged, service standards were never a part of my request. With respect to the language in .468 having to do with application of a formula or process intended to gauge the performance of a dealership, that was also not at issue.

MR. BRAY: It's the or otherwise enforced.

MS. PHILLIPS: Absolutely. It's the or otherwise enforced standards or guidelines in the sale of a motor vehicle, and what we have are guidelines for advertising that has to do with the sale of a motor vehicle, and that the application of those guidelines, a dealer, in the sale of that vehicle, may not be treated unfairly and equitably.

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MR. BRAY: And that's the import of 4 through 10?

MS. PHILLIPS: Yes, sir. It's just a building block.

MR. WALKER: Mr. Chairman.

MR. VANDERGRIFF: Mr. Walker.

MR. WALKER: Would this not be an appropriate time to instead of us -- I can sympathize with where Karen is coming from and where the dealers are wanting this to go, but wouldn't this be an appropriate time that we have an advisory committee sit down and formulate between the dealers and between the manufacturers a proposed opinion that says this amicably how we think that going down this road we ought to go?

MR. VANDERGRIFF: Well, the problem I would see in trying to pull that off in this kind of capacity is that I don't know how many manufacturers we'd have to include because everybody has a different twist to this.

I'm not sure that the advisory process would not get 1 unwieldy on this particular issue to do it that way. 2 We 3 can certainly come back to that idea. I think it's probably good and appropriate, if 4 we're through with Ms. Phillips at this point on the 5 6 questions, we certainly can reserve the right to bring her back up, but there's two other speakers that have a 7 different take. 8 MR. WALKER: Looking at this, in my opinion, it 9 is very overly broad. 10 MR. VANDERGRIFF: I understand, and I think 11 that's another question we could take up on contemplation 12 13 of what to do. In response, I think we had ten minutes for the 14 15 applicant to make a presentation, we've gone over that 16 because we've been asking questions, but the next two speakers we have, in deference to that -- which, again, 17 questions could take longer -- we'll give them five 18 19 minutes to be able to tell us their thoughts. The next speaker that we have speaking against 20 us taking this as a formal opinion is Tiffany Hildreth. 21 MS. HILDRETH: Thank you, members of the board. 22

What was noticed for today's meeting, what was

I'm Tiffany Hildreth. I'm here representing BMW North

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America.

invited for comments from the public and others was the following: a formal opinion regarding the below described factory website marketing program and incentive payment and whether it complies with Occupations Codes .467 and .468, and then there was a very detailed description of that program. As of about 12:15, what is now being asked of the board is to provide some general discussion and guidance on the broad topics of incentive programs and two-tier pricing in order to determine what is just and fair under the Code at large.

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Respectfully speaking, I think the board is being asked to do something that they can't do for a myriad of reasons which I'll try to touch on, the first and foremost because today what was proposed to be on the agenda today for your consideration is not what's being requested through this proposed order right here.

BMW has a great interest in this topic as a manufacturer, but also because it does have a website standards program that it introduced to its dealers in January and invited dealer comment and interaction, and in fact, a lot of interaction occurred which resulted in changes, such that as of April of 2011 when one might be looking at the program, it looked one way, through the summer and into the fall it looks entirely different. All of that was the result of dealer interaction with the

manufacturer. All of BMW's Texas dealers utilize this program. None of them are being treated differently in any way.

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As Ms. Cost pointed out, the proposed formal opinion that's being asked of you simply does not comply with the agency's rules, and as a board you have lots of power but you certainly have to allow for the rules, and the rules say that you can't provide a formal opinion when to do so would require so much investigation, collateral inquiry and research. She gave you a very good succinct example of something that you could give a formal opinion on. And as I think has been pointed out in the comments that you already have, what was requested of you, and frankly, what's even requested of you now, would require so much research and investigation you cannot reasonably -- I'll use that word -- render a formal opinion, and therefore, it would be in violation of Rule 215 to do so.

It appears to me, and I'm just speaking my own opinion, that it was quickly recognized that this request would not meet Rule 215. Therefore, any thought of tying the request to your statute was abandoned, any thought of tying the request to a particular program, particular aspects was abandoned, because it would not comply with Rule 215. Instead, we've now been asked to have you opine

formally as to the text, explicit text of the statutory provisions, and then, I believe, in parts 5 through 10 you're being asked to give kind of a generalization summary of that same text, none of which is useful.

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It is only parts 11 through 13 that are before you today now -- which really should not be before you -- that have any potential specific bearing, but even these, by the very wording themselves, show that you can't render an opinion. Let me give you an example. Number 11 asks that you declare that a manufacturer's website that only links some of its dealers' URL websites and not others is unreasonable under the Code. Under what part of the Code, under which provision of the Code? Just in general? There is no general obligation under the Code under reasonableness, they're all specifically defined.

And unreasonable, as pointed out in our comments, that phrase is universally recognized throughout the legal system as one that cannot be determined as a matter of law. If you're determining something is reasonable or not is a fact-specific inquiry. And applying that to number 11, they're saying you're supposed to declare a blanket statement that any time a website is not included on the manufacturer's website, it's unreasonable.

I know everyone has gotten a little upset with

maybe some of our extreme examples that have come up, but let's put it this way: what if some dealer out there at some point in time, for God knows what reason, decides to put images on the website that no one wants to see. Do you think the manufacturer shouldn't be able to immediately remove their link so that they're not somehow connected to a dealer who is doing on its website that's illegal? As written, that's just unreasonable and in violation of the Code. That's why you can't make an opinion on number 11 because what is reasonable depends on the facts, the situation.

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Let's look at number 12. A marketing program that results in two-tier pricing of motor vehicles is not in compliance with the Code. What provision of the Code, what part number? That's a big code, and this doesn't say anything about that? A program that results in two-tier pricing, well, how far does this result chain go? Does a program say there will be two-tier pricing, or does it just somehow maybe follow that in a particular situation, depending on the dealer's own decisions and the dealer's choices, maybe with a different manufacturer, et cetera, that somehow it came out to be two-tier pricing. You're supposed to opine on that when there's so many situations that could exist?

Number 13, an incentive program which involves

instructions regarding advertising must balance needs with the realities regarding the franchisee's rights for advertising. This doesn't even try to tie it to the Code, this doesn't even reference the Code at all, much less a specific provision. Is this meant to create some new statutory law? I don't know. But it doesn't tie it to the Code at all which you're supposed to be opining on, by the way, whether the situation is in violation of the Code.

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And if it involves instructions or requirements regarding advertising, well, my gosh, as even this requests initially, there's lots of instructions and requirements, they can range from something very specific to broad, something very minute such as be sure and spell BMW's name right.

The point is, as written this doesn't provide any help, it's far beyond what's required of a formal opinion under Rule 215.4. This should simply not even be addressed because, what is before you even says this, and which has been pointed out by Ms. Cost, and I guess even by the person who requested it, that it doesn't meet Rule 215.

MR. VANDERGRIFF: Any questions?

(512) 450-0342

(No response.)

MR. VANDERGRIFF: Thank you.

ON THE RECORD REPORTING

And we have a third, Ken Roche.

2.3

MR. ROCHE: Good afternoon, Ms. Cost and members. My name is Ken Roche. I'm with Gulf States Toyota, a private distributor of Toyota in Texas.

I'd like to try to give you a perspective on a manufacturer/distributor view of programs and what kinds of things go into it that a fact-finder would need to evaluate to determine unreasonableness. And I'm going to give you a couple of examples that are on the extreme edge, but it's to try to give you a sense of that thee's more than just the description of the result which are in or out of the proposal or the program.

For instance, Gulf States Toyota invested money in helping each of its dealers set up websites, so if we've contributed money to a website development program for each of our dealers and worked with them and the dealer council and with our deal people in getting the input but we've invested freely where they don't have to pay that back, that would be a significant factor in a fact situation on whether the requirements that are required of the dealer are, in fact, reasonable or not.

So if I take, for instance, someone is not allowed to be on the unit, and a couple of examples have been given, but if someone is developing a website that is not specific to the Toyota store but is rather a brand

that they're trying to develop for their auto complex of three or four or five different brands, we, as the manufacturer, with our dealer agreement, have the right to expect our dealer to invest in and develop the brand value of the Toyota store. And so if their website is strictly a brand X autoplex-driven and the majority of the material in that website is more specific to a brand value of their complex and their five brands, then we think we have the right under our agreement and under the statute to be able to make requirements that if they're going to have access to our web program that that's not acceptable and we're not going to let them participate.

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Another example, just to give you a little bit of flavoring, and what I'm trying to give you are a couple of examples because what I'm trying to say is that there are many other factors that each individual manufacturer would bring to the table to say put in context our requirement, here's what we're trying to accomplish, here's what we expect a dealer to require.

For instance, I think it's true in most of most manufacturers, but all of the investment that Toyota and Gulf States Toyota does in its advertising to draw someone to make a call or to hit Google and hit Toyota, with that individual's zip code from their personal address, that lead is directed directly to the dealer whose primary

market area includes that zip code, so we're providing a value. And in return for that kind of value, there are requirements.

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Now, if you're going to start evaluating are the requirements to the dealer reasonable, you have to know the rest of the story. So I'm only trying to give you the perspective there's much more to it than just three or four requirements that the dealer has to meet. To put it in context is that a reasonable requirement, you have to know the rest of the story.

Now, in the context of what TADA and Ms.

Phillips is trying to do, we've advocated, in our discussions with the chairman for years now in development of the agency and the program, that advisory opinions are helpful. Here, the context of what we see and what I think the written opinions that you got from both sides, we tried to say that this may be particularly complex, it's not so simple to put it in a one-sentence graph kind of saying this is not going to be fair and equitable. We would suggest that it requires more investigation, you have to look at what the relationship is, what the investments for both sides are and what the objectives are.

Thank you.

MR. VANDERGRIFF: Thank you.

ON THE RECORD REPORTING (512) 450-0342

Does anybody on the board have any further 1 questions of any of the witnesses or Ms. Cost? 2 3 (No response.) MR. VANDERGRIFF: I'm certainly pleased to 4 entertain discussion and open any suggestions here by the 5 6 board. 7 MR. BUTLER: Mr. Chairman, I'd like to make a 8 motion that we not issue a formal opinion on this issue. MR. VANDERGRIFF: We have a motion. 9 Do we have 10 a second? MR. INGRAM: That's a motion not to do a formal 11 opinion as presented in the agenda? 12 13 MR. BUTLER: Yes. MR. INGRAM: Second. 14 15 MR. VANDERGRIFF: We have a motion and a 16 second. Any discussion? 17 (No response.) MR. VANDERGRIFF: One thing that I'm concerned 18 19 about, I don't want to invest or get into specific individual matters that should be better resolved in a 20 SOAH setting, but I do think that this body has a real 21 process to play in perhaps reducing litigation costs and 22 time by issuing formal opinions, and so I guess I'm still 2.3 24 torn in this particular matter by should this be taken

under some advisement to see if there is a better thought

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that we'd have for the future versus rejecting it 1 2 entirely. 3 MR. INGRAM: Well, my second is for the item in the agenda. 4 MR. VANDERGRIFF: I understand. And that's why 5 6 I'm making that comment, that I'm not sure that we don't 7 have a role to play here. I think that certainly there 8 are manufacturer representatives here that I'm sure their clients would agree they'd love to reduce litigation costs 9 10 on matters, and maybe not the lawyers themselves -- no offense taken or meant -- but I also know that many of the 11 industry, the franchisees would clearly not like to have 12 13 to be in major litigation in matters, and we can play a role in that, I think. 14 15 But we do have a motion and a second. Any further discussion? 16 MR. WALKER: I'm confused about what Blake just 17 made his comment to about his second. 18 19 MR. VANDERGRIFF: He is basically making a motion to kill what was presented to us in our agenda. 20 Не hasn't necessarily rejected this -- by this I mean the 21 22 more general approach that Ms. Phillips presented. MR. WALKER: The motion is to not issue a 2.3 24 formal opinion. That's what the motion is. 25 MR. VANDERGRIFF: That's right. You seconded

1	it differently than that, so your second may not be
2	applicable.
3	So Blake, your second may not be applicable.
4	MR. INGRAM: That would be up to Cliff if he
5	would be amenable.
6	MR. BUTLER: I want to dispose of this is
7	getting too much into the business I mean, it's the
8	tail wagging the dog, so to speak and let the economics
9	take care of it, the money flow. The manufacturers invest
10	millions in websites and they give the dealers benefit of
11	it; sure they should have control over it.
12	MR. INGRAM: Could I request that we tailor it
13	in two sections, perhaps? Maybe we just go ahead and
14	dispose of the initial request?
15	MR. WALKER: Amend the motion.
16	MR. INGRAM: That would be up to
17	MR. VANDERGRIFF: No. You can make an
18	amendment.
19	MR. INGRAM: Then I'd like to amend the motion.
20	I'm sorry.
21	MR. VANDERGRIFF: He doesn't have to accept the
22	amendment.
23	MR. BUTLER: Okay, I'll accept the amendment.
24	MR. WALKER: So restate your amended motion.
25	MR. INGRAM: The amended motion is to deny
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ON THE RECORD REPORTING (512) 450-0342

the -- how was it worded -- the formal opinion? 1 2 MR. VANDERGRIFF: As presented. MR. INGRAM: As presented. 3 MR. WALKER: In our packet. 4 MR. INGRAM: In our docket for today. 5 MR. VANDERGRIFF: And you've accepted that 6 amendment? 7 MR. BUTLER: 8 Yes. MS. JOHNSON: So what you're saying is not that 9 you object necessarily that perhaps we define 10 reasonableness, fair and so forth, but that consideration 11 12 of the formal opinion request from TADA concerning factory 13 website marketing program incentive payments is your problem? I'm trying to understand what the problem is 14 15 with what's presented. Is it the way that the staff 16 interpreted the presentation? Because they weighed 17 heavily on my initial decision. MR. VANDERGRIFF: Well, the only thing before 18 19 us today is the specific request that was made June 14, that is the request that's before us. 20 MR. INGRAM: That request is specifically kind 21 of a moot point because it's not even being presented 22 23 really. 24 MR. BUTLER: Yes, but it's the only thing that 25 was on the public agenda.

MR. INGRAM: Right. And so, henceforth, I just 1 want to kill that. 2 3 MR. PALACIOS: And the second part is forming an advisory group? 4 MR. INGRAM: There isn't a second part to my 5 6 motion, but if you want to make another motion to mine. 7 MR. PALACIOS: I thought that's what you threw 8 in there at the end. Are we just voting to kill the 9 proposal for opinion? 10 MR. VANDERGRIFF: Yes. MR. WALKER: Not this, that has nothing to do 11 with this, I don't think. It has to do with this here. 12 13 MR. VANDERGRIFF: I think the question would be would you be amenable to some process in which -- I'm not 14 15 trying to put words in your mouth -- the process of 16 looking at issuing some formal opinion here, not 17 necessarily as has either been presented to us or certainly along the lines of what's in our book, but we 18 19 haven't closed the door on doing this at some point based upon the question. That's not your motion as amended, but 20 is that your intention? That's what I think people are 21 22 trying to get to. MR. INGRAM: Well, I guess that's my intention, 2.3 24 so I guess I would adjust my motion to ask the staff to

look at the request for proposal as presented by TADA.

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1	MR. BUTLER: They've already recommended that
2	it
3	MR. BRAY: Honestly, the staff has not
4	recommended anything with regard to that proposal because
5	we've never seen it before today.
6	MR. INGRAM: Right.
7	MR. VANDERGRIFF: The staff has recommended
8	denial of the proposal as presented in our books, and the
9	motion is to deny that as presented in our books. I
10	think, and I'm not trying to put words in your mouth, the
11	thing that everybody is asking for is this the finality,
12	is the issue over, and I think what you're saying is you
13	would like to potentially, if this motion passes, still
14	consider issuing a formal opinion in this area in some
15	other manner.
16	MR. WALKER: I'm with that.
17	MS. JOHNSON: I'm with that too.
18	MR. VANDERGRIFF: Okay. Well, then why don't
19	we take care of this motion
20	MR. WALKER: Withdrawing your second.
21	MR. VANDERGRIFF: No. You could kill this
22	motion.
23	MR. WALKER: We could kill it by just
24	withdrawing or we'll just vote and let it die.
25	MR. BUTLER: You're confused. You've got to

ON THE RECORD REPORTING (512) 450-0342

1	pass this one before you get to the next one.
2	MR. VANDERGRIFF: That's exactly right.
3	MR. BRAY: What I think we understand your
4	present motion to be is to deny or not consider a formal
5	opinion on what as published and what has been under
6	consideration since June.
7	MR. VANDERGRIFF: That's correct. As
8	presented, that's the motion that you allowed an amendment
9	to.
10	MR. INGRAM: That's fine, just go with that,
11	and then we can deal with the other.
12	MR. VANDERGRIFF: Yes. We haven't concluded
13	the matter necessarily.
14	So there's a motion before us to deny issuing a
15	formal opinion on the matter as presented to the board and
16	considered by the public and discussed here today. Any
17	further discussion? It's been moved and seconded. All
18	those in favor please raise your right hand in support.
19	(A show of hands.)
20	MR. VANDERGRIFF: All those opposed.
21	(A show of hands.)
22	MR. VANDERGRIFF: Then the motion to deny is
23	denied on a three to three vote.
24	MS. JOHNSON: It's three to three.
25	MR. VANDERGRIFF: It's three to three.

ON THE RECORD REPORTING (512) 450-0342

MS. JOHNSON: So the motion to not issue an 1 opinion fails. 2 3 MR. VANDERGRIFF: That's correct. The motion to deny has failed. 4 MR. WALKER: I'd like to make a motion. 5 6 MR. VANDERGRIFF: Please do. 7 MR. WALKER: I'd like to make a motion that we send this to staff with recommendations of a formal 8 opinion to come back to us with a formal opinion as to how 9 10 we need to address this. I mean, I agree that we as a board are ought to eliminate problems within the industry 11 before they get to the courthouse if at all possible. 12 13 It's a lot cheaper on everybody, and I told Ms. Phillips at the beginning, as the owner of a company, solve your 14 15 problems before you get there if you can. But I see hers 16 as being very overly broad, it's not specific enough as to 17 dealing with some of the things that need to be dealt with. 18 19 MR. VANDERGRIFF: Can I make a suggestion on your motion? 20 MR. WALKER: Yes. 21 22 MR. VANDERGRIFF: Perhaps we direct staff to come back, since this motion has been denied, by failure 2.3 24 it tied so it's denied, so we will not be issuing a formal

opinion at this point, that we perhaps come back at the

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1	next board meeting in January and discuss maybe what would
2	be the appropriate area and way for us to weigh in to the
3	topics such as this, maybe not this particular but such as
4	this, have some further discussion about that.
5	MR. WALKER: I think that's where I'm trying to
6	go.
7	MR. VANDERGRIFF: Okay.
8	MS. JOHNSON: And I'm going to second your
9	motion.
10	MR. VANDERGRIFF: Mr. Bray, you've got some
11	concerns I can tell.
12	MR. BRAY: Just January.
13	MR. VANDERGRIFF: We may do it in February, we
14	could move forward a month based on the heavy caseload
15	we've got for that particular meeting.
16	MR. INGRAM: So what's the motion?
17	MR. WALKER: That we direct staff to go back
18	and evaluate this and give us a better opinion of a formal
19	opinion that needs to be issued.
20	MR. VANDERGRIFF: Well, how we can weigh in on
21	matters such as this, what might be an appropriate way.
22	MR. WALKER: Yes.
23	MR. VANDERGRIFF: Mr. Bray?
24	MR. BRAY: I'm fine. I don't know if Mr.
25	Walker hears you. I hear you to be saying this might be a

rulemaking potential.

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MR. VANDERGRIFF: Potentially. I think that we are of a point where all the parties, I would like to think, in this room would agree that we should avoid litigation if possible, but at the same time we don't want to get ourselves in the weeds of specific cases. And frankly, I'm editorializing here at the moment, but on things such as websites, there are multiple websites with multiple manufacturers, I think that's a can of worms for us that we probably don't want to tread too heavily into.

However, there is a topic here that we should address and the public and the industry should address, and that is our role in these formal opinions, how deeply. We've got a rule about how we post and get opinions from them but we haven't really discussed how we make those decisions, and that's probably appropriate.

MR. WALKER: Isn't the real issue the incentive.

MR. VANDERGRIFF: Well, I think everybody wants the money, that we'd probably get universal agreement on.

They want to spend it and the dealers want to get it.

MR. WALKER: But isn't that where the argument is as to whether or not the incentive is legal or not legal?

MS. JOHNSON: Whether the incentive's terms are

legal and fair and reasonable.

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MR. INGRAM: Reasonable fair and equitable.

MS. JOHNSON: And equitable. I would like to address that issue as well, because we are a litigious society and we don't need a Star 8, 9 or 10.

MR. VANDERGRIFF: But some of those are fact questions that we really can't weigh in on. The specific area I'm trying to get us to is let's hone in on what our role is in the formal opinion process. We've got a procedure now to post it to the industry, which I think is very good, to request formal opinions and so now we should probably address how we do that, and that's where we can get more information from the staff, we can certainly ask the public, the industries to comment and perhaps that, for example, when Mr. Roche was talking about advisory committees, that's probably the more appropriate rather than specifically on websites, the most appropriate role is us in our role on formal opinions, what the would find helpful.

MR. WALKER: Well, 215 does allow us specifically to issue a formal opinion to the industry.

MR. VANDERGRIFF: Yes, it does.

MR. BRAY: And since 1998 there have been a handful of formal opinions of varying bodies, your predecessors and yourself, on everything from incentive

payments to brokering, to wholesale advertising, to whether a motorized scooter is a vehicle, to whether a car club sharing program is a licensing issue, there have been several and they're varied. So not 100 percent sure that I now understand what our task is.

MR. VANDERGRIFF: Well, I think we can work that out if we'll just get out of this room.

(General laughter.)

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MR. VANDERGRIFF: Because at this point we have basically killed the request for a formal opinion, but I think this body still needs to have further discussion about our role in this process and how to refine it. And remember that this has become a much broader body now than it used to be, so we've got a greater responsibility than was before us.

MR. INGRAM: Is a motion really necessary?

MR. VANDERGRIFF: Not really.

MR. WALKER: And my next question is we don't have to have a request from Karen Phillips over here in order to issue an opinion, anyway, do we? We can do that on our own, can we not, or does it have to come through a request?

MR. BRAY: Well, the rule says any person may request a formal opinion, and I guess any person could be one of you.

MR. INGRAM: Well, the item on the agenda has 1 2 failed and we've given direction to staff. I don't see 3 the point of really belaboring it much more. MR. VANDERGRIFF: I concur. 4 MS. JOHNSON: Call for the vote. 5 MR. VANDERGRIFF: Well, I don't think we need 6 to at this point. We will bring this item up for 7 8 discussion at an upcoming board meeting. MS. JOHNSON: He's withdrawn his motion? 9 MR. WALKER: Yes. 10 MR. VANDERGRIFF: Yes. 11 12 With that, we're moving into item number 5, the 13 briefings for the board. We are missing the two members of the board that on the executive search -- we're on 5.A, 14 15 by the way, executive search services RFP -- and so I am 16 not sure, Julie is here who participated in that to give 17 us an update with respect to the search firms. MS. BEISERT: For the record, my name is Julie 18 19 Beisert. I just want to give you a very brief update on 20 where we are. We received two proposals. The first round 21 of evaluations occurred yesterday and we will go into the 22 second round of evaluations on the 14th, and hopefully 2.3 24 have a vendor at that point.

MR. VANDERGRIFF: And the board will recall

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that although Victor Rodriguez and Laura Ryan are working on that, in conjunction with me, that when we get to that final one we could move forward with executing an agreement with them with the executive director to get them on board.

MS. BEISERT: Yes.

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MR. VANDERGRIFF: Okay. Business process analysis, you might stay seated. Julie is obviously engaged on our behalf with that, combined with the organizational assessment update and the board workshop. Everyone knows that we are having a board workshop specifically on the organizational analysis and the business process analysis that's come out of the review of the agency. Those two items are going to be taken up and considered along with the senior staff, and that will be the focus of that January 4 meeting.

You have on your desk a book by a gentleman named Mike Conduff. He will be facilitating that meeting. His specialty is in board governance and board policies. It's a very short read, you can read it in a half afternoon, board members, but I would encourage you to read it -- it's not required reading, but it will give you a flavor for the stuff that he does. And we'll also have David Eisenlohr there from the Azimuth Group who did the organizational assessment, and we will have a couple of

folks there from the Gartner Group who did the business process analysis.

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So we should have a very good meeting, very good discussion, and get a lot of good things accomplished as setting forth a timeline for the implementation of the remaining things in the organizational assessment and a real good timeline for the business process analysis which is a redefining of how we do business here at the agency.

The advisory committee, Senate Bill 529

Advisory Committee, Ms. Cost, of course, is here if you have any questions but expect that to come back in January to you for any considerations that we might need.

And with that, we're just kind of starting on some of the other things, at least from the standpoint of the board's involvement, and I'll turn it to the executive director.

MS. FLORES: Included in my briefing is two documents that are in your board packet. The first document is the annual financial report for the fiscal year that we just completed, August 31, 2011. Before I move on, I'd like to recognize two of my staff members. I'd ask that they stand. They are the accountants who helped prepare this document, Phyllis Dawson, Leslie Camarillo.

The major item that I would like to briefly

mention with regards to this document is two things: one, 1 it was compiled according to Government Code and all the 3 requirements established by the comptroller of the State of Texas, and two, which is reflected on page 4, it's a 4 combined statement of revenues, expenditures and changes 5 6 in fund balance is that we transferred, as we're required 7 to do, approximately \$1 billion to the Texas Department of 8 Transportation for Fund 6 for use. As we've always 9 indicated, we support the revenue generation for that 10 fund. Other than that, I'm available and my staff is 11 available to answer any specific questions you may have. 12 13 MR. BUTLER: Fund 6 is the roads? MS. FLORES: Yes, sir. 14

MR. VANDERGRIFF: And for the year, we ended up lapsing, based on what we had originally been appropriated?

MS. FLORES: Approximately \$100 million. So that went into the fund balance.

MR. VANDERGRIFF: It's in this total. It's listed as \$101.8 million.

MS. FLORES: Yes, sir.

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MR. VANDERGRIFF: So we didn't keep any money we didn't absolutely need, and one of the concerns that had been voiced during the legislative session we were

created was the fear that TxDOT would lose control of funds that we didn't need absolutely for operations, and I think it's safe to say we gave them a whole lot of money back.

MS. FLORES: We sure did.

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MR. VANDERGRIFF: So they had an added return on investment that might not have been directly attributable to anything other than us not spending it, so I appreciate that effort. And Linda played the dominant role in that in her role as the chief financial officer, so thank you very much.

MS. FLORES: The other document again is the monthly expenditure summary, revenue and expenditure summary for the month of October 2011. Because we are now becoming a more stable agency, our accounting reports are getting a little more complicated. In any given fiscal year you can have multiple appropriation year expenditures, so you're going to start seeing where we've committed things by the end of August 31 and bills are in transit and so they don't really get to us to be processed until after the new fiscal year begins, so in order to be transparent in our financial data, we've included some details that you will see in there. You'll see expenditures from the prior appropriation year that are hitting the current fiscal year, so we've tried to kind of

detail that out for you.

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But bottom line, we're still collecting, in any given month, over \$100 million in revenue, for the month of October total expenditures were \$8 million, and on page 4 of your summary you will see that chart of revenue compared to expenditures, and as always, you'll see that there is a wide margin between the two.

And the last page of the document still includes the projected revenue analysis of the My Plates speciality license plates initiative, and that has not changed. They still are projected or on track to meet their financial obligation to the State of Texas in 2014.

And I'm available to answer any questions you may have.

MR. VANDERGRIFF: Does anybody have any questions?

(No response.)

MR. VANDERGRIFF: And I think you have one item left on your update and that's the automated system project update.

MS. FLORES: Yes, sir. Actually, we have Dawn Heikkila here to kind of give us an update.

At the board meeting last month I did report some vacancies that were yet to be posted, and so I did ask Dawn to kind of give us an update of where those

postings are at.

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MS. HEIKKILA: For the IT section and the Administrative Services Division. For the record, my name is Dawn Heikkila, the chief operating officer for the Department of Motor Vehicles.

I have 26 IT positions, two of which are a result of employees that have left or separated from the department. This week we posted eight of those positions and we have five or six additional ones that will be posted the first of next week. I also have some additional positions, three positions that were posted in the Administrative Services Division, with three position job descriptions being developed and those will be posted next week as well. So we're moving very quickly to recruit and hire the expertise we need for our IT section as we march down the path towards independence.

And that kind of leads me into the project update, unless you have questions on the hiring.

MS. JOHNSON: You have 26 vacant IT positions out of how many?

MS. HEIKKILA: I have currently 70.

MS. JOHNSON: Okay. That's a huge vacancy.

MS. HEIKKILA: It is, and some of that is a product of how we were created and trying to determine through the ILAP and through kind of our growth and

evolution what expertise we were going to need to be independent, have an independent IT shop. We're soliciting and recruiting for positions that we don't currently have in the organization and some of the expertise we're trying to attract may or may not even be present in the legacy organization.

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MR. VANDERGRIFF: But you're also not trying to fill them before you absolutely need them either.

MS. HEIKKILA: Right. We wanted to make sure we knew where we were headed and what we were going to need to support so that we could attract the appropriate skill sets and expertise.

MS. JOHNSON: Thank you.

MS. HEIKKILA: And with regard to projects really quickly, because I think I'm the last thing before adjournment, the county equipment replacement project started out with some bumps, we've smoothed that out, the vendor is gaining proficiency, the deployments are going much more smoothly. To date we have deployed 228 work stations in 45 different sites representing installations in 23 counties.

The feedback, now that we've gotten the process smoothed out, is significantly more positive. Our partners are very patient and we appreciate that and things are going much better. The next two-week rolling

schedule is going to focus on deployments in Bexar County in the San Antonio area and seven other county installations which will add an additional 177 work stations transformed.

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The automation project update, the BPA is pretty much included, Gartner is wrapping up any work that's still outstanding on the BPA. We've engaged Gartner to assist us with procurement assistance, performing an alternative analysis on the 19 initiatives that were identified in the business process analysis. They're going to help us establish an enterprise project management office and refine and revise our governance processes so that we can move forward in implementing some of our modernization initiatives.

The KEES project, we have one additional release that will go out January 23 that's going to address some legislative items and a potential IRP change.

We have the Web Sub project we're starting to deploy. That's been a raging success. We've actually used that in conjunction with some of the deployments for some of the small sites that couldn't close or we couldn't deploy after hours, so we used that as an alternative for them so that they could remain open and process renewals while the deployment was going on.

MR. INGRAM: I'm drawing a blank on Web Sub.

MS. HEIKKILA: That is a URL connection into the RTS application, so it's a web interface where you can process renewals, and the whole purpose of that project is so that the subcontractors for the counties, like your HEBs and stuff, can eventually process applications directly into the RTS application.

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MR. INGRAM: Right. I remember now.

MS. HEIKKILA: The LACE update, we've suspended LACE pending the outcome of the BPA. Now that the BPA is completed and we've identified what those modernization initiatives are, and looking at the priorities of the top six, we're going to go back and reevaluate the work that has been done on the rewrite to see what is the best option for moving forward for some of the functionality that the dealers are asking for.

MR. VANDERGRIFF: We might be able to use LACE and not have to go out and procure an additional source to do that.

MS. HEIKKILA: Right. And when we're evaluating these initiatives, we want to make sure that we take into consideration any work that's been done in house, because the absolute best business option might be to in-source something as opposed to out-source, that might be the biggest bang for the buck.

Work is continuing on ILAP, that's wrapping up.

They've complete the as-is environment analysis and they're beginning to compile all that information in a document that they're going to publish, and then that information that they've collected for the as-is state of our network hardware, software, the connectivity to the legacy applications, that's information that the Gartner Group will use to inform the future state architecture analysis which is something that we definitely want to make sure we get right going forward.

That's really it in a nutshell, if there are any projects on projects that are going on.

MR. WALKER: I don't have to have a question, I just want to ask you to explain to the board the problem, maybe in particular Cheryl might want to know, and I know Victor probably already knows, the problems that we encountered that caused all the delays with the equipment with TxDOT closing our pipeline down.

MS. HEIKKILA: There were some challenges on getting the work stations to join to the network during the initial phases of the deployment. I'm sure that you've heard or probably have heard from some of our county partners that the deployment was going slow, it was failing, they were having to reverse systems back. One of the issues identified is we used T1 dedicated circuits to connect these county locations to the RTS application.

Those connections had actually been throttled back or capped and didn't have the ability to expand as they needed to when the transmission data going across those lines increased such as during deployment when the equipment was looking for connectivity to the main hub and it was looking to got through some kind of an identification process and to validate the updates for the system. Having those caps removed solved a lot of that problem, and that's allowed the deployment to go much more smoothly.

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MR. WALKER: And we're paying \$300,000 a month for those lines that have been capped over there in the tech building that TxDOT, I think, apparently has had them toned back down. I asked how in the world did we find this, and our tech guy, Gary is the guy that figured all this out for us, so Gary is doing a good job.

MS. HEIKKILA: Gary does an excellent job. He had assistance from the DIR folks.

MR. WALKER: We're getting installations done in 45 minutes a unit now where it was taking all day to get a unit up, and they think that the big problem is this pipeline of information was being restricted where we couldn't get this information running.

MS. HEIKKILA: That was a significant challenge during deployment.

MR. VANDERGRIFF: And now it's not. 1 2 MR. WALKER: We think this is all going to go a 3 whole lot faster. MS. HEIKKILA: Right. That challenge has been 4 eliminated. We're still working with some efficiency 5 6 issues and skill sets and stuff, but we get better every day and we learn every day and it's definitely a lot 7 smoother than before. 8 MR. WALKER: And I would like to commend Dawn, 9 because she does an excellent job of being on task on 10 11 what's going on on all that we have, we have so many 12 projects going on. And she and I were here last night 13 till late going over this stuff, and she really has a real good handle on what's going on and knows every particular 14 15 aspect of it, and I know she puts in lots of long, hard 16 hours beyond what she needs to be doing to get the job done. 17 I want to thank you, Dawn, for what you do. 18 19 MS. HEIKKILA: Thank you. I also need to recognize the staff that supports me in doing that. If I 20 didn't have their support and their information, I 21 22 couldn't do it. MR. VANDERGRIFF: Thank you very much. 2.3 24 Any further questions? 25 (No response.)

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MS. HEIKKILA: Thank you.

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MR. VANDERGRIFF: We have one final item, and I've stalled all afternoon hoping it would get here.

MS. FLORES: Not till 3:00.

MR. VANDERGRIFF: I understand that, and we won't have that privilege of having this nice audience wait till three o'clock for what I'm about to say.

Me've come to the conclusion of the board meeting, and the last item on the agenda is really the recognition of the service of Cliff Butler, who is a charter member, so to speak, of our board of directors, and he has been a great member of us to have. He has been a true public member, coming to us with a wealth of industry knowledge of big business, both private and public companies, from his time with Pilgrim's Pride, but he also brought that knowledge and really succinctly brought it to bear on numerous occasions, including here today, through our board meetings. So we're very dearly going to miss you in the process here and have appreciated your role in the startup of this agency and spending two years with us.

He retired only to get more busy in retirement towards the end and he's got a full-fledged new business that he's working hard on in his real estate business and needs to devote more time to that, so we certainly

understand and appreciate that. 1 The reason we waited until the end of this is 2 3 that we have a plaque of recognition for you, and unfortunately, it won't be here until 3:00, so we have 4 failed to get that here in a timely manner, but we 5 6 certainly will get that to you appropriately for your service. 7 8 MR. BUTLER: Give it to Dawn, she'll send it to 9 me. 10 MR. VANDERGRIFF: Yes, she'll get it to you. MR. WALKER: You need to wait, Cliff, it's 11 worth the wait. 12 13 (General laughter.) MR. VANDERGRIFF: I think he says he's going to 14 15 be back by 5:30, so that's not going to work. 16 But anyway, thank you again very much for your 17 service. MR. BUTLER: Thank you. 18 19 MR. VANDERGRIFF: And I'll let any of the board members who wish to comment to please do so. Do any board 20 members have any comments? 21 MR. INGRAM: I am so sorry to see you go, 22 Cliff. You've been a great asset to the board. Thank you 23 24 very much. 25 MR. BUTLER: Thank you.

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1	MR. VANDERGRIFF: Cliff, anything?
2	MR. BUTLER: I've learned a lot.
3	(General laughter.)
4	MR. VANDERGRIFF: Doesn't say whether it's all
5	good.
6	MR. BUTLER: I've enjoyed it and enjoyed the
7	new people I've met and the friends for life.
8	MR. VANDERGRIFF: Thank you very much. I want
9	to note that his lovely bride is here as well and sat
10	patiently through this whole meeting watching us, learned
11	a lot too, as well. So we appreciate you allowing him to
12	serve with us, as well, and to support that.
13	So with that, I'd be pleased to entertain a
14	motion to adjourn.
15	MR. WALKER: So moved.
16	MS. JOHNSON: Second.
17	MR. VANDERGRIFF: Motion and a second. All
18	those in favor please raise your right hand.
19	(A show of hands.)
20	MR. VANDERGRIFF: We are adjourned.
21	(Whereupon, at 1:33 p.m., the meeting was
22	concluded.)

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MEETING OF: TxDMV Board

LOCATION: Austin, Texas

DATE: December 8, 2011

I do hereby certify that the foregoing pages, numbers 1 through 189, inclusive, are the true, accurate, and complete transcript prepared from the verbal recording made by electronic recording by Nancy King before the Texas Department of Motor Vehicles.

 12/18/2011 (Transcriber) (Date)

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